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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE TIMES MIRROR COMPANY,
TRIBUNE NEWSPAPERS WEST, INC.,
and LOZANO ENTERPRISES,

Appellants,

v.

THE CITY OF LOS ANGELES,

Appellee.

On Appeal from the California Court of Appeal, Second Appellate District, Division Two

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether a municipal ordinance which, without any justification, imposes widely disparate tax burdens on various types of media, violates the First and Fourteenth Amendments?

2. Whether a municipal ordinance which imposes different tax burdens on various types of media, thereby enhancing the relative voices of some members of the media at the expense of others, violates the First and Fourteenth Amendments?

3. Whether a municipal ordinance which grants standardless discretion to a government official to apportion tax burdens on the media violates the First and Fourteenth Amendments?*

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* All parties to this case are named in the caption. Appellant The Times Mirror Company has an interest in the following subsidiaries and affiliates: Los Angeles Times-Washington Post News Service Inc., Sumerfit Newsprint Corp., Graphic Controls Corp., and Tejon Ranch Company. Appellant Times Mirror has no other parent company, subsidiary (except wholly-owned subsidiaries), or affiliate within the meaning of Rule 28.1 of the Rules of this Court.

Appellant Tribune Newspapers West, Inc. is a wholly-owned subsidiary of the Tribune Company, which publishes, among other newspapers, the Chicago Tribune. Appellant Tribune Newspapers West, Inc. has no other parent company, subsidiary, or affiliate within the meaning of Rule 28.1 of the Rules of this Court.

Appellant Lozano Enterprises has no other parent company, subsidiary, or affiliate within the meaning of Rule 28.1 of the Rules of this Court.

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JURISDICTIONAL STATEMENT

The Times Mirror Company, Tribune Newspapers West, Inc., and Lozano Enterprises ("appellants") appeal from the decision of the California Court of Appeal, Second Appellate District, Division Two, which held that certain provisions of the Los Angeles Municipal Code which impose different taxes on different members of the media and which grants standardless discretion to a city official to apportion tax burdens on the media do not violate the First and Fourteenth Amendments.

Each of the three questions presented merits review by this Court because they constitute the next

logical steps in resolving the issues that flow from this Court's decisions in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), and *Arkansas Writers' Project, Inc. v. Ragland*, No. 85-1370 (Apr. 22, 1987), 107 S. Ct. 1722 (1987).

First, the constitutionality of imposing widely disparate taxes on different media was expressly left open by this Court in *Arkansas Writers' Project, Inc. v. Ragland*, slip op., at 11, 107 S. Ct., at 1729. Without the benefit of clear guidance from this Court, courts facing this issue have reached inconsistent and irreconcilable results. *See* part C, *infra*. Therefore, there is a pressing need for the Court to resolve this issue.

Second, in *Buckley v. Valeo*, 424 U.S. 1 (1975), this Court held that a statute, which limited spending in political campaigns, enhanced the relative voices of some speakers at the expense of others in violation of the First and Fourteenth Amendments. 424 U.S., at 48-49. However, this Court has expressly left open the question of whether differential taxation of the media is unconstitutional under *Buckley*. *Minneapolis Star*, 460 U.S., at 593 n.17. The Court should now decide this issue and thereby resolve the conflicts that have and will continue to develop in the lower courts on the constitutionality of differential taxation of the media. *See* part C, *infra*.

Third, the delegation of standardless discretion to a city official, where First Amendment interests are deeply implicated, has previously been held to be unconstitutional by this Court in the context of a state's regulatory authority. *See, e.g., Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1938).

However, this Court has not yet decided the constitutionality of such standardless discretion in the context of a state's taxing power. Once again, the lack of a clear rule of law on this issue has resulted in inconsistent and conflicting decisions by state and federal courts that require this Court's intervention.

The resolution of these issues is not only of substantial interest to the parties because of the large sums at stake,[1] but is also of substantial interest to all media and taxing authorities in this country because the City of Los Angeles is one of the largest municipalities in America, whose success or failure in this case will set a national pattern for what is permissible in taxing the media.

OPINIONS BELOW

The May 28, 1987 opinion of the Second District Court of Appeal is reproduced in App. A, *infra*, 1a-25a, and is reported at 192 Cal. App. 3d 170, 237 Cal. Rptr. 346 (1987). The September 3, 1987 order of the California Supreme Court denying appellants' Petition for Review is reproduced in App. B, *infra*, 26a, and is unreported. The October 2, 1987 judgment of the Court of Appeal, known as a remittitur, is reproduced in App. C, *infra*, 27a.

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[1] Currently, more than four million dollars is at issue in this case, and that figure increases at the rate of more than one million dollars a year. In addition, numerous lawsuits by other media entities are pending against the City of Los Angeles which raise the same issues as this case. Those lawsuits are awaiting the outcome of this case.

JURISDICTION

Appellants contended below that certain provisions of the Los Angeles Municipal Code violate the First and Fourteenth Amendments to the United States Constitution. Both the trial court and the Court of Appeal held that the challenged provisions were constitutional, and judgment was entered in favor of appellee, the City of Los Angeles. App. A, *infra*, 25a. The California Supreme Court subsequently denied appellants' Petition For Review. App. B, *infra*, 26a.

A Notice of Appeal of this case to this Court was filed in the Court below on November 18, 1987. App. D, *infra*, 28a-30a. This appeal is being docketed in this Court within 90 days from the California Supreme Court's denial, on September 3, 1987, of appellants' Petition For Review.

For reasons discussed more fully below, this Court has appellate jurisdiction over this case under 28 U.S.C. § 1257(2). *See, e.g., Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476 (1975).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment of the Constitution provides, in pertinent part, that:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

2. Los Angeles Municipal Code, ch. II, § 21.109, is quite lengthy and is therefore set forth in full in App. E, *infra*, 33a-38a. This section contains the specific tax rates and methods of taxation applied to motion

picture producers. The tax is based upon production costs, rather than gross receipts, and increases in steps from $125.00 per year (for production costs of $50,000.00) to a maximum of $10,750.00 (for production costs of $4.2 million or more).

3. Los Angeles Municipal Code, ch. II, § 21.166, is quite lengthy and is therefore set forth in full in App. E, *infra*, 39a-40a. This section contains the specific tax rates and methods of taxation applied to wholesale newspaper sales. The tax is computed at the rate of $20.00 for the first $20,000.00 or less of gross receipts, plus $1.00 for each additional $1,000.00 of gross receipts or fraction thereof.

4. Los Angeles Municipal Code, ch. II, § 21.167, is quite lengthy and is therefore set forth in full in App. E, *infra*, 40a-42a. This section contains the specific tax rates and methods of taxation applied to retail newspaper sales. The tax is computed at the rate of $18.75 for the first $15,000.00 or less of gross receipts, plus $1.25 for each additional $1,000.00 of gross receipts or fraction thereof.

5. Los Angeles Municipal Code, ch. II, § 21.15(h), is quite lengthy and is therefore set forth in full in App. E, *infra*, 33a. This section empowers the City Clerk to promulgate whatever rules and regulations to apportion taxes "as are necessary or desirable."

6. Los Angeles Municipal Code, ch. II, § 21.147, 21.189.2, 21.190, 21.192, and 21.197 are quite lengthy and are therefore set forth in full in App. E, *infra*, 38-39a, 42a-49a. These sections contain the specific tax rates and methods of taxation applied to other First Amendment activities, *e.g.*, radio and television broadcasters, and billboard companies.

STATEMENT OF THE CASE

This case involves a constitutional challenge to certain provisions of the Los Angeles Municipal Code, which impose a business tax on various media, including appellants. Each of the appellants publishes a newspaper in the Los Angeles area.[2]

The City of Los Angeles has for some time imposed a tax on various businesses operating within the City. Prior to January 1, 1984, § 21.190(c)(7) and (8) of the Los Angeles Municipal Code expressly exempted the media's publishing and broadcasting receipts from the City business tax. Effective January 1, 1984, the City amended the Municipal Code to tax the activities of newspaper publishers, including appellants, and broadcasters of radio and television. As amended, the Code applies different tax rates and methods of taxation to different First Amendment activities.[3]

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[2] The Times Mirror Company publishes a daily newspaper, the Los Angeles Times. Tribune Newspapers West, Inc., at the time this lawsuit was filed, published a daily newspaper, the Los Angeles Daily News. Lozano Enterprises publishes a daily newspaper, La Opinion.

[3] Throughout this brief, appellants will refer to newspapers, broadcasters, and other communicative or expressive activities as "First Amendment activities." Such activities are protected by the First and Fourteenth Amendments to the Constitution. *See, e.g., Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952) (motion pictures, like books, magazines, and newspapers, are included within free speech and free press guarantees, even though sold for profit); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee"); *United States v. Paramount Pictures*, 334 U.S. 131

By grafting these new provisions on to the already complex structure of the Municipal Code, Los Angeles now taxes different First Amendment activities at widely disparate rates. The following chart, based on the Los Angeles Municipal Code, demonstrates the wide disparities in taxes on various First Amendment activities:

SECTION	ACTIVITY	RATE
21.109	Motion Picture Producers	Multi-tiered rate structure with a maximum tax of $10,750
21.147	Theaters	$18.75/1st $15,000 $1.25/add'l. $1000
21.166	Newspaper, Magazine, and Book Publishers—Wholesale	$20.00/1st $20,000 1.00/add'l. $1,000
21.167	Newspaper, Magazine, and Book Publishers—Retail	$18.75/1st $15,000 $1.25/add'l. $1,000
21.189.2	Radio & T.V.	$18.75/1st $15,000 $1.25/add'l. $1,000
21.190	Billboard Companies	$30.00/1st $6,000 $5.00/add'l. $1,000
21.192	Movie Rentals	$30.00/1st $12,000 $2.50/add'l. $1,000
21.197	Telephone Company (Including Yellow Pages)	$20.00/1st $20,000 $1.00/add'l. $1,000

Furthermore, movie producers are taxed on production costs, rather than on their gross receipts. By the Los Angeles City Clerk's own estimate, produc-

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(1948) (movies, newspapers, and radio are all protected by the First Amendment).

tion costs equal only one-half the amount of gross revenues. Thus, not only are movie producers taxed at a lower *rate* than other First Amendment activities, the *method* of taxation further reduces their taxes.

As a result of these disparate rates and methods of calculating taxes, businesses engaged in protected First Amendment activities are subject to vastly different tax burdens. Based on the above rates, the tax on one hundred million dollars in production costs for the motion picture industry would be *$10,750*; a billboard company with the same one hundred million dollars in gross receipts would owe the City *$500,000*; and a newspaper would owe a tax of *$125,000* on its retail receipts or *$100,000* on its wholesale receipts. For example, while appellant Times Mirror was required to pay over $800,000 in business taxes for 1985, motion picture producers in Los Angeles, no matter what their income, paid a maximum tax of no more than $10,750, or barely more than one percent of the tax imposed on Times Mirror.

Such differential taxation of First Amendment activities is impermissible absent a showing of a compelling justification for such disparate treatment. *Minneapolis Star*, 460 U.S., at 585. The City has never attempted to justify this differential taxation in any way nor has the City ever attempted to explain why a maximum tax of $10,750 on movie producers is necessary or appropriate.

In addition, the Los Angeles Municipal Code empowers the City Clerk to apportion the City's business taxes in any manner he sees fit. The Clerk is instructed to employ whatever method he thinks is "necessary and desirable" in apportioning tax bur-

dens. L.A.M.C. 21.15(h). Such unfettered and standardless discretion in applying taxes to First Amendment activities is also unconstitutional.

On August 27, 1984, appellants filed this suit on the grounds that the provisions of the Los Angeles Municipal Code, which impose differential taxes on different members of the media and which grant standardless discretion to the City Clerk to apportion those taxes, were unconstitutional under the First and Fourteenth Amendments to the United States Constitution. The trial court granted summary judgment in favor of appellee, City of Los Angeles, stating that the Municipal Code "passed constitutional muster." App. A, *infra*, 8a.

On appeal, the Second District Court of Appeal upheld the trial court's finding of constitutionality of the Los Angeles Municipal Code, stating that "[t]he municipal ordinance here does not possess the constitutional infirmities that were present in either *Minneapolis Star* or *Premier Communications*." App. A, *infra*,14a.[4] The Court of Appeal also rejected appellants' constitutional challenge to the City Clerk's standardless discretion: "Next we reject plaintiffs' contention that the ordinance is unconstitutional on its face because it grants the city clerk absolute discretion in apportioning the amount of gross receipt taxes to be collected from businesses engaged in protected First Amendment activities." App. A, *infra*, at 18a-19a.

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[4] Appellants also expressly contended that the Los Angeles ordinance was unconstitutional under the rule set forth in *Buckley*, *supra*, but the Court of Appeal did not expressly address this issue.

A. Appellate Jurisdiction

Appellate jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1257(2). Under that statute for there to be jurisdiction in this Court, an appellant must have "drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . ." In the courts below, appellants directly challenged the constitutionality of the same provisions of the Los Angeles Municipal Code that are at issue here and did so on the same constitutional grounds asserted here. As discussed above, the trial court and the Court of Appeal squarely decided that the challenged Municipal Code provisions were constitutional. App. A, *infra*, 8a, 14a, 18-19a.

The Municipal Code is clearly a "state statute" for purposes of § 1257(2). *See, e.g., Erznoznik v. City of Jacksonville*, 422 U.S. 205, 207 n.3 (1975); *Lathrop v. Donahue*, 367 U.S. 820, 824-25 (1961). This Court may, in any event, treat these papers as a petition for writ of certiorari under 28 U.S.C. § 2103 and exercise jurisdiction pursuant to 28 U.S.C. § 1257(3).

B. The Questions Presented Are Substantial and Important

Appellants do not contend that, by virtue of the protected status of their publishing activities under the First Amendment, they are totally immune from taxation. Rather, appellants have challenged the constitutionality of those provisions of the Los Angeles Municipal Code which impose widely disparate taxes on different media and which grant the City Clerk standardless discretion to apportion taxes on the media.

Neither the City of Los Angeles nor the Court of Appeal's decision seriously disputes that the Los Angeles Municipal Code favors some First Amendment activities over others by differential taxation, *e.g.*, by limiting movie producers' maximum tax to $10,750 while imposing no limit on the maximum tax on newspapers or any other First Amendment activity. Furthermore, there is nothing in the record below which provides any justification whatsoever, let alone a compelling one, for this differential treatment.

In response to appellants' argument that the City had not justified its disparate treatment of different media, the Court of Appeal simply asserted that there are "inherent differences" between movie producers and other media, and that appellants had not shown that movie producers "operate[] in a manner similar to" newspapers. App. A, *infra*, 17a. This position, if accepted, would eviscate this Court's decisions in *Minneapolis Star & Tribune Co.*, *supra*, and *Arkansas Writers' Project*, *supra*.

First, even assuming *arguendo*, that the City had shown that there are "inherent differences" between movie producers and other media which are constitutionally significant and which might therefore justify different tax treatment (which it did not), *the City has never attempted to show that the particular rates and methods of taxation applied to movie producers are justified by the "inherent differences" between movies and other media*. Specifically, the City has not and cannot show that any such "differences" justify a cap on the tax paid by movie producers of $10,750.00, while there is no limit to the tax paid by newspapers, so that, for example, Times Mirror pays

some $800,000 a year in taxes, which is some seventy-five times as much as any movie producer.

Second, the unsupported and unexplained assertion that movie producers and newspapers are "different" is constitutionally inadequate to justify disparate tax treatment. This Court has held that differential taxation of the media is unconstitutional absent a *compelling* justification. Thus, in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, this Court invalidated a Minnesota state tax on the cost of paper and ink products consumed in the production of publications which exempted the first $100,000 worth of ink and paper consumed. This Court found no evidence that the Minnesota Legislature adopted the tax for any impermissible motive or to censor the media, 460 U.S., at 580; nonetheless, this Court invalidated the tax on the ground that its structure alone, which singled out the press for disparate treatment without any justification for such differential taxation, was unconstitutional. As this Court recognized in *Minneapolis Star*, if differential taxation is permitted, "the threat of burdensome taxes becomes acute" and "[t]hat threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government." *Id.*, at 585.

That concern is equally applicable here. Instead of singling out a limited group of newspapers to receive the brunt of the tax, as was true in *Minneapolis Star*, the Los Angeles Municipal Code taxes various types of First Amendment activities at many different levels and gives overwhelmingly favorable treatment to a small group—movie producers. As in *Minneapolis*

Star, this allows the government to use taxes as a threat that critical commentary will lead to burdensome taxes. This is constitutionally impermissible. *Arkansas Writers' Project, Inc. v. Ragland*, slip op., at 6, 107 S. Ct., at 1727 ("selective taxation of the press—either singling out the press as a whole or targeting individual members of the press—poses a particular danger of abuse by the State.").

Third, the Court of Appeal improperly placed the burden of proof on appellants to show that there is no justification for the City's differential treatment of the media. Under this Court's decision in *Minneapolis Star*, once it has been established that the media is being differentially taxed, the City has the burden of justifying the disparate treatment. *Minneapolis Star*, 460 U.S., at 585. The City never even attempted to meet this burden.

It is not appellants' position that differential taxation of different media can never be justified, but rather that a compelling justification for differential treatment must be shown. As this Court has recognized, state tax laws which differentially tax different media are permissible, but only where the government has adequately justified the disparate treatment. *See, e.g., Matter of the Assessment of Additional North Carolina and Orange County Use Taxes Against Village Publishing Co.*, 313 N.C. 211, 322 S.E.2d 155 (1984), *appeal dismissed for want of a substantial federal question*, 472 U.S. 1000 (1985);[5] *Chicago Tribune Co. v. Johnson*, 106 Ill. 2d 63, 477 N.E.2d 482, *appeal dismissed for want of a substantial federal question*,

[5] Justices Brennan and White dissented from this dismissal. 472 U.S. 1001, 1003 (1985).

474 U.S. 915 (1985). This Court has never upheld a differential tax scheme where the government failed to provide any justification whatsoever for disparate treatment of the media. Yet, that is precisely what the Court of Appeal did here.

That these federal constitutional questions are substantial and important is made clear by this Court's recent decision in *Ragland*. There, the Court struck down an Arkansas statute which exempted all newspapers and certain special interest magazines from a sales tax, but which applied the tax to general interest magazines. The Court held that the Arkansas tax statute was unconstitutional because it differentiated between magazines based upon their content; the Court expressly left open the issue of whether the differential taxation of newspapers and magazines was also unconstitutional. Slip op., at 11, 107 S. Ct., at 1729. This Court's identification of that unresolved issue, which is at the heart of appellants' case here, demonstrates the substantiality of the constitutional questions presented in this appeal.

A second substantial issue presented by this appeal is whether differential taxation of various types of media is unconstitutional because it permits the government to enhance the relative voice of some members of the media at the expense of others. In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court struck down a portion of the Federal Election Campaign Act, which limited expenditures in political campaigns to "equaliz[e]" the ability of individuals and groups to influence elections, holding that a statutory scheme which favors one form of expression over another is unconstitutional:

> *. . . the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment,* which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources' ", and " 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' "

424 U.S., at 48-49 (citations omitted; emphasis added). This Court later applied this same rationale to invalidate a law which prohibited corporations, but not others, from making contributions to referenda campaigns. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

In *Minneapolis Star*, the application of *Buckley* to differential taxation of various types of media was raised. However, since the statute at issue was declared unconstitutional on other grounds, this Court expressly left open the question of *Buckley's* application to differential taxation. 424 U.S., at 593 n.17. This issue should now be resolved by this Court, so that the application of this important constitutional principle is clear.

A third substantial issue presented by this appeal is the constitutionality of the standardless discretion granted to the City Clerk to apportion the imposition of taxes. A long line of decisions by this Court has squarely held that the delegation of standardless discretion violates the First Amendment. *See, e.g., Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939) (striking down city licensing ordinance which empowered city official to refuse the permit if,

in his opinion, the refusal would prevent "riots, disturbances, or disorderly assemblage"); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 149-50 (1969) (holding unconstitutional an ordinance that stated that a permit shall be granted unless, in the judgment of the city commission, "[t]he public welfare, peace, safety, health, decency, good order, morals or convenience required that it be refused").

The Court of Appeal's decision dismissed these cases as inapplicable because they purportedly deal with "regulatory" authority under the police power as opposed to "taxing authority," implying that the latter is somehow less subject to constitutional limitations. App. A, *infra*, 22a. Such a distinction is utterly untenable. *See, e.g.*, *McCulloch v. Maryland*, 4 Wheat 316, 431 (1819) ("the power to tax involves the power to destroy"); *Massachusetts v. United States*, 435 U.S. 444, 455-56 (1977) ("[*A*] *tax is a powerful regulatory device*; a legislature can discourage or eliminate a particular activity that is within its regulatory jurisdiction simply by imposing a heavy tax on its exercise") (emphasis added); *Speiser v. Randall*, 357 U.S. 513, 518 (1957) ("It is settled that speech can be effectively limited by the exercise of the taxing power"). However, this conflict cannot be resolved without an authoritative decision by this Court.

C. Because the Questions Presented Have Generated Substantial Conflicts Among the State and Federal Courts, They Require Resolution by This Court

The Court of Appeal's decision in this case compounds a conflict among the courts that have considered these issues, because it is squarely contrary to controlling authority in other jurisdictions, both on the federal and state level.

First, the Court of Appeal's decision here is squarely contrary to controlling authority in other states. In *Louisiana Life, Ltd. v. McNamara*, 504 So. 2d 900 (La. Ct. App. 1987), the Louisiana court invalidated on federal constitutional grounds a state sales tax which applied to magazines but exempted newspapers. Applying this Court's reasoning in *Minneapolis Star*, the Louisiana appellate court explicitly held that "disparate tax treatment of some First Amendment entities is the type of 'singling out' that the United States Supreme Court held unconstitutional in *Minneapolis Star*." 504 So. 2d, at 905. Thus, the Louisiana appellate court held that such disparate tax treatment is unconstitutional absent a compelling state interest, and then found that the State had not shown any such interest. *Id. Louisiana Life* directly conflicts with the decisions below in this case.

In contrast, in *Thomson Newspapers v. Florence*, 287 S.C. 305, 338 S.E.2d 324 (1985), the South Carolina Supreme Court reversed a lower court's decision which had held unconstitutional a city ordinance because it imposed a higher business license tax on newspapers than on any other businesses. In upholding the ordinance, the South Carolina Supreme Court held that this Court's decision in *Minneapolis Star* was inapplicable because only newspapers were subject to the particular Minnesota statute in question, while the South Carolina law taxed everyone. 338 S.E. 2d, at 325. The rationales of *Louisiana Life* and *Thomson Newspapers* are irreconcilable because *Louisiana Life* requires the government to justify differential taxation of the press, while *Thomson Newspapers* permits such differential taxation even

though no government justification whatsoever is offered to support it.

Furthermore, in an advisory opinion, the Florida Supreme Court recently stated that taxing some members of the media while exempting others—namely, movie producers—does not constitute "discriminatory taxation" under *Minneapolis Star*. *In Re Advisory Opinion to the Governor*, 509 So. 2d 292, 309 (Fla. 1987). This decision directly contradicts the holding in *Louisiana Life* that "singling out" of certain media for favorable tax treatment is unconstitutional. Thus, there is a clear conflict between state courts on the issue of differential taxation of the media.[6]

Indeed, the California Court of Appeal's decision here is even inconsistent with the decision of the California Court of Appeal, First Appellate District, in *City of Alameda v. Premier Communications Network, Inc.*, 156 Cal. App. 3d 148, 202 Cal. Rptr. 684, *cert. denied*, 469 U.S. 1073 (1984). In *Premier*, the Court of Appeal, relying on *Minneapolis Star*, properly invalidated an Alameda city tax ordinance which imposed a different tax burden upon subscription television services than on many other businesses without directly advancing any compelling government interest. *See also Festival Enterprises, Inc. v. Pleasant Hill*, 182 Cal. App. 3d 960, 227 Cal. Rptr. 601 (1986) (invalidating, under *Minneapolis Star*, a municipal "admissions tax" on entertainment events where the plaintiffs' movie theaters were the only businesses actually subject to the tax).

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[6] Because of the Tax Injunction Act, 28 U.S.C. § 1341, there are no federal court decisions on the constitutionality of such state tax schemes. *Ragland*, slip op., at 11, 107 S. Ct., at 1730.

In the present case, the Second Appellate District refused to find the challenged provisions of the Los Angeles Municipal Code unconstitutional, even though they tax various types of media at different rates, and even though the City of Los Angeles has made no attempt whatsoever to provide any justification, let alone a compelling one, for this differential treatment. Despite this clear conflict in authority, the California Supreme Court denied, without explanation, appellants' Petition For Review. Thus, even within the State of California, there are two conflicting lines of authority with regard to differential taxation of First Amendment activities.

Finally, the Court of Appeal's decision on the last question presented by this case, namely, whether the City may grant standardless discretion to a government official to apportion taxes on the media, is squarely at odds with *Big Mama Rag v. United States*, 631 F.2d 1030 (D.C. Cir. 1980). There, the District of Columbia Circuit held that certain language contained in IRS regulations on tax exemptions for educational institutions was so vague that it gave the IRS excessive discretion in granting or denying exemptions. *Id.*, at 1034-35. The court found that this excessive discretion violated the First Amendment: "The standards may not be so imprecise that they afford latitude to individual IRS officials to pass judgment on the content and quality of an applicant's views and goals and therefore to discriminate against those engaged in protected First Amendment activities." *Id.*, at 1040. The decision of the Court of Appeal here cannot be reconciled with the federal court's decision in *Big Mama Rag*, despite the Court of

Appeal's unexplained assertion that the distinctions are "obvious." App. A, *infra*, at 24a.

Thus, there is a well-developed conflict in the lower courts with respect to each of the constitutional issues presented by this appeal. Accordingly, the need for this Court to determine the application of the federal constitution to differential taxation of various types of media, and to the granting of broad discretion to government officials with respect to taxation of the media, is both clear and immediate.

CONCLUSION

Probable jurisdiction should be noted and this case set for argument to resolve the substantial federal constitutional questions which have been decided adversely to appellants, notwithstanding contrary and controlling precedent in this Court, and to resolve the conflict in result and analysis among the federal and state courts which have considered these questions.

December 1, 1987.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION TWO

No. B023000
(Super.Ct.No. C 511941)

THE TIMES MIRROR COMPANY, TRIBUNE NEWSPAPERS WEST, INC., and LOZANO ENTERPRISES,
Plaintiffs and Appellants,

v.

THE CITY OF LOS ANGELES, and DOES 1 through 50, inclusive,

Defendants and Respondents.

FILED
MAY 28, 1987

APPEAL from a judgment of the Superior Court of Los Angeles County. John L. Cole, Judge. Affirmed.

Gibson, Dunn & Crutcher, Rex S. Heinke, William C. Foutz, and Kelli L. Sager; The Times Mirror Company, William A. Niese and Jeffrey S. Klein for Plaintiff and Appellant, The Times Mirror Company.

Hufstedler, Miller, Carlson & Beardsley and Fred L. Leydorf for Plaintiff and Appellant, Tribune Newspapers West, Inc.

Sheppard, Mullin, Richter & Hampton, Frank Simpson III and Kathyleen A. O'Brien for Plaintiff and Appellant Lozano Enterprises.

Harry P. Warner as Amicus Curiae on behalf of Southern California Broadcasters Association and National Association of Broadcasters; Henry L. Baumann, of Counsel, as Amicus Curiae on behalf of National Association of Broadcasters.

James K. Hahn, Los Angeles City Attorney, Thomas C. Bonaventura, Senior Assistant City Attorney, Richard A. Dawson, Assistant City Attorney and Michael L. Klekner, Deputy City Attorney, for Defendant and Respondent, City of Los Angeles.

In an action for declaratory relief, injunction, and recovery of taxes paid under protest by plaintiffs Times Mirror Company, Tribune Newspapers West, Inc., and Lozano Enterprises, each engaged in the printing and publication of a daily newspaper or newspapers,[1] the trial court determined that a business tax levied against them by defendant City of Los Angeles (City) was constitutionally valid. Summary judgment was thereafter entered in favor of the City and this appeal followed. We affirm.

The facts are undisputed. Los Angeles Municipal Code (L.A.M.C.) section 21.03 requires that a business tax registration certificate must be obtained and a business tax paid by every person who engages in any of the businesses or occupations enumerated in subsequent sections. The section further provides that the tax is imposed pursuant to the City's taxing power solely for the purpose of gener-

[1] During and prior to 1984, the Times Mirror Company published the Los Angeles Times and Lozano Enterprises published La Opinion. Although at the outset of this litigation Tribune Newspapers West, Inc. published both the Daily News and the Greensheet Shopper, the Daily News is currently owned and published by the Cooke Media Group, Inc.

ating revenue.[2] Different businesses pay taxes calculated by a variety of methods, including flat fees, "per unit" fees, daily charges, percentages of payroll, and percentages of gross receipts.[3]

Prior to January 1984, the code expressly exempted from the business tax gross receipts derived from "the publication and sale of newspapers, magazines and other periodicals regularly issued at intervals not exceeding three months" as well as the gross receipts of businesses engaged in radio and television broadcasting. (Former L.A.M.C. § 21.190(c)(7) and (8).) In 1983, however, the City Council amended the code to eliminate these exemptions and inserted provisions taxing receipts derived from newspaper sales and advertising (L.A.M.C. §§ 21.166(f), 21.167(e)) and from radio and television broadcasting (L.A.M.C. § 21.189.2). As part of this change, the business of "publishing or publishing and printing" was included within the term "manufacturing" and "newspapers, mag-

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[2] L.A.M.C. section 21.03 provides in pertinent part:

"(a) Subject to the provisions of this Article, a business tax registration certificate must be obtained and a business tax must be paid by every person engaged in any of the businesses or occupations specified in Sections 21.50 to 21.198, inclusive, of this Article; and a business tax is hereby imposed in the amount prescribed in the applicable section. No person shall engage in any business or occupation subject to tax under the provisions of this Article without obtaining a registration certificate and paying the tax required thereunder.

"(b) The business tax registration certificate required to be obtained and the tax required to be paid are hereby declared to be required pursuant to the taxing power of the City of Los Angeles solely for the purpose of obtaining revenue. Compliance with such requirements shall not be construed to be a condition precedent to engaging in any business or occupation within the City of Los Angeles where the imposition of such a condition precedent would be contrary to law."

[3] For the 1984 tax year, 273,125 businesses were subject to the municipal ordinance which raised over $131 million in revenues for the City. In 1985, 250,653 "accounts" generated approximately $142 million in revenue.

azines, periodicals, books and other printed matter" were classified as "goods, wares or merchandise." Pursuant to L.A.M.C. section 21.166, wholesale newspaper sales became subject to an annual business tax of $20.00 per year for the first $20,000 of gross receipts, and $1.00 for each additional $1,000 of gross receipts or fractional part thereof. (L.A.M.C. § 21.166(a).) Under L.A.M.C. section 21.167, retail newspaper sales became taxed at the rate of $18.75 for the first $15,000 of gross receipts plus $1.25 for each additional $1,000 of gross receipts or fractional part thereof. (L.A.M.C. § 21.167(a).)[4]

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[4] Both L.A.M.C. sections 21.166 and 21.167 establish generic classifications and tax rates for all wholesale and retail business activities within the City.

Section 21.166 provides in relevant part:

"(a) For every person manufacturing and selling any goods, wares or merchandise at wholesale, or selling any goods, wares or merchandise at wholesale, and not otherwise specifically taxed by other provisions of this Article, the tax shall be $20.00 per year or fractional part thereof for the first $20,000.00 or less of gross receipts, plus $1.00 per year for each additional $1,000.00 of gross receipts or fractional part thereof in excess of $20,000.00; provided that blind persons need not include the first $20,000.00 of gross receipts in the computation of the amount of tax due hereunder, nor be required to pay the minimum tax of $20.00. This exemption shall not subject such blind person to the provisions of Section 21.190 of this Code. (Amended by Ord. No. 140,833, Operative 1/1/71.)

"(b) For the purpose of this section, a wholesale sale or sale at wholesale means a sale of goods, wares or merchandise for the purpose of resale in the regular course of business.

". . . .

"(f) For the purpose of this section, newspapers, magazines, periodicals, books and other printed matter shall be deemed to be included in the term "goods, wares or merchandise"; publishing or publishing and printing shall be deemed to be included in the term "manufacturing"; and the term "gross receipts" shall mean California receipts from the selling or furnishing of advertising or advertising space in printed matter in addition to California receipts from the sale of goods, wares

For purposes of determining the amount of tax due under the foregoing sections, revenue generated from the sale or furnishing of advertising by those engaged in publishing or publishing and printing was included within

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and merchandise. The provisions of this subsection shall apply only to business tax periods commencing on or after January 1, 1984. (Added by Ord. No. 158, 484, Eff. 12/29/83.)"

Section 21.167 states in part:

"(a) For every person manufacturing and selling any goods, wares or merchandise at retail or selling any goods, wares or merchandise at retail, and not otherwise specifically taxed by other provisions of this Article, the tax shall be $18.75 per year or fractional part thereof for the first $15,000.00 or less of gross receipts, plus $1.25 per year for each additional $1,000.00 of gross receipts or fractional part thereof in excess of $15,000.00; provided that blind persons need not include the first $15,000.00 of gross receipts in the computation of the amount of tax due hereunder nor be required to pay the minimum tax of $18.75. This exemption shall not subject such blind person to the provisions of Section 21.190 of this Code. (Amended by Ord. No. 140,833, Operative 1/1/71.)

"(b) For the purpose of this section, a retail sale or sale at retail means a sale of goods, wares or merchandise for any purpose other than resale in the regular course of business.

"(c) Whenever a person engages at the same location in two or more businesses of the kind taxed in this section, a joint Registration Certificate shall be issued for all such businesses and the tax shall be measured by the sum of the gross receipts of all such businesses so conducted.

". . . .

"(e) For the purpose of this section, newspapers, magazines, periodicals, books and other printed matter shall be deemed to be included in the term "goods, wares or merchandise"; publishing or publishing and printing shall be deemed to be included in the term "manufacturing"; and the term "gross receipts" shall mean California receipts from the selling or furnishing of advertising or advertising space in printed matter in additional to California receipts from the sale of goods, wares or merchandise. The provisions of this subsection shall apply only to business tax periods commencing on or after January 1, 1984. (Added by Ord. No. 158,484, Eff. 12/29/83.)"

"gross receipts." As a further result of the amendments to the code, radio and television broadcasters became subject to the same tax rates imposed on retail newspaper sales. (L.A.M.C. § 21.189.2.)[5]

The ordinance further imposes a tax on all theaters in the City, including movie theaters, which is calculated in the same manner and at the same rate as the tax for retail sales under § 21.167. (L.A.M.C. § 21.147.) Section 21.192 requires those engaged in renting or leasing tangible personal property, including motion picture rentals, to pay a tax of $30.00 on the first $12,000 of gross receipts, and $2.50 for each additional $1,000 or fraction

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[5] L.A.M.C. section 21.189.2 provides in pertinent part:

"(a) For every person engaged in business as a radio broadcaster or television broadcaster the tax shall be $18.75 per year or fractional part thereof for the first $15,000.00 or less of gross receipts, plus $1.25 per year for each additional $1,000.00 of gross receipts or fractional part therof in excess of $15,000.00.

"(b) For the purpose of this section, the following terms shall be defined as follows: 1. 'Radio Broadcaster' shall mean any person engaging in the business of producing and broadcasting or broadcasting local or network radio programs or advertising material, including but not limited to the furnishing of services, program elements or facilities in connection with such production and broadcasting or broadcasting. 2. 'Television Broadcaster' shall mean any person engaging in the business of producing and broadcasting or broadcasting local or network television programs or advertising material, including but not limited to the furnishing or services, program elements or facilities in connection with such production and broadcasting or broadcasting. A 'television broadcaster' shall include any person operating a television system where the viewing audience pays a fee to view the broadcast.

". . . .

"(e) The provisions of this section shall apply only to business tax periods commencing on or after January 1, 1984."

Prior to the 1984 amendments, the broadcast media were only subject to the business tax to the extent that they engaged in motion picture production and related activities.

thereof. Motion picture and cartoon production is classified and taxed under section 21.109. The measure of the tax is based upon the total of the gross costs of production and gross receipts from the lending of employees and the furnishing of studio facilities from other film producers. The tax itself is graduated and ranges from $125 for the first $50,000 of gross receipts and production costs, up to a maximum of $10,750 when the measure of the tax is $4.2 million and above.

In computing the tax owed under the ordinance, income received from the sale of goods shipped out of state is excluded from the gross receipts of both wholesale and retail businesses, including those engaged in the publication of printed material. (L.A.M.C. § 21.168.1.) L.A.M.C. section 21.15(h) further authorizes the City Clerk to promulgate rules and regulations for the apportionment of gross receipts "according to the amount of business done in the City of Los Angeles, or in the State of California, as the case may be, . . ." Pursuant thereto, Clerk's Rulings No. 13 and No. 14, relating to persons with and without a fixed place of business within the City, describe the manner in which gross receipts should and should not be considered "directly attributable" to local activities and provide procedures and practices to be followed in making that determination.

Based upon the foregoing provisions of the municipal ordinance, the Times Mirror Company paid under protest approximately $1.4 million in business taxes for the years 1984 and 1985. For the same period, Tribune Newspapers West, Inc. paid $202,000 and Lozano Enterprises paid $22,000. After exhausting their various administrative remedies to secure a refund from the City, plaintiffs initiated this litigation. Following argument on the newspapers' motion for summary judgment and the City's motion for summary adjudication of issues, the trial court found that the applicable provisions of the ordinance did not impose a special or discriminatory tax on the newspapers

or the media in general. It further held that L.A.M.C. section 21.15(h), authorizing the City Clerk to apportion gross receipt taxes, and the rulings promulgated thereunder (i.e., Tax Rulings Nos. 13 and 14) passed constitutional muster.

In urging us to reverse, plaintiffs first contend that the business tax is unconstitutional because it unjustifiably imposes a differential tax burden on a variety of First Amendment activities and discriminates between First Amendment and non-First Amendment enterprises. In support of this argument plaintiffs allege that "the tax on fifty million dollars in production costs for the motion picture industry would be $10,750; the same gross receipts received in a year through lectures, shows, or entertainment, would be taxed at only $155; a telephone company receiving the same amount of gross receipts for the Yellow Pages would owe the City $50,000; a billboard company . . . would owe the City $250,000 . . . a newspaper would owe a tax of $62,500 on its retail receipts or $50,000 on its wholesale receipts; and a radio or television broadcaster would owe $62,500. . . ." The newspapers further point out that the City taxes various non-First Amendment businesses at lower rates than those imposed on the broadcast and print media.[6]

The power of the City to levy taxes derives from Article XI, section 5 of the California Constitution which authorizes charter cities to "make and enforce all ordinances and regulations in respect to municipal affairs. . . ." Taxation for the purpose of generating revenue is a municipal affair within the meaning of Article XI. (*City of Los Angeles* v.

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[6] As evidence of these lower rates, plaintiffs cite to provisions of the ordinance which tax amusement rides at an annual rate of $125 (L.A.M.C. §21.94), junk dealers at $500 per year (L.A.M.C. §21.100), shoe repair outlets at $0.75 per $1,000 (L.A.M.C. §21.186), and trucking-hauling companies at a maximum rate of $0.22 per day (L.A.M.C. §21.195).

A.E.C. Los Angeles (1973) 33 Cal. App.3d 933, 939.) A municipal taxing scheme is thus valid unless preempted by state law or prohibited by constitutional principles. (*United Business Com.* v. *City of San Diego* (1979) 91 Cal.App.3d 156, 164; *Century Plaza Hotel Co.* v. *City of Los Angeles* (1970) 7 Cal.App.3d 616, 622.) Here, of course, plaintiffs maintain that the City's business tax violates the constitutional guaranties of free speech and press.

The First Amendment prohibits the enactment of any law "abridging the freedom of speech, or of the press . . . ," and is applicable to state and municipal action pursuant to the Fourteenth Amendment. (*Douglas* v. *Jeannette* (1943) 319 U.S. 157, 162; *City of Alameda* v. *Premier Communications Network, Inc.* (1984) 156 Cal.App.3d 148, 152.)

There are two basic ways in which First Amendment rights may be impinged: (1) a direct regulation of speech or press based on the content of the material (see e.g., *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council* (1975) 425 U.S. 748; *Keyishian* v. *Board of Regents (1967) 385 U.S. 589; Mills* v. *Alabama* (1966) 384 U.S. 214); or (2) an indirect or incidental regulation of speech or press resulting from pursuit of governmental goals unrelated to freedom of expression (see e.g., *Buckley* v. *Valeo* (1976) 424 U.S. 1; *Branzburg* v. *Hayes* (1972) 408 U.S. 665; *Kovacs* v. *Cooper* (1949) 336 U.S. 77).

The instant case presents a question falling into the second category: the incidental or indirect impact of taxation on First Amendment activities. (See *Murdock* v. *Pennsylvania* (1943) 319 U.S. 105, 112.) The structure of the tax is not content oriented.

Although the government may not unduly burden freedom of speech or of the press through taxation or other regulatory measures, it is beyond dispute that the provisions of the First and Fourteenth Amendments do not exempt newspapers and the business of newspaper pub-

lication from generally applicable economic regulations and taxes. (*Grosjean* v. *American Press Co.* (1936) 297 U.S. 233, 249; *Festival Enterprises, Inc.* v. *City of Pleasant Hill (1986) 182 Cal.App.3d 960, 963; City of Corona* v. *Corona etc. Independent* (1953) 115 Cal.App.2d 382, 387.)

The state has the power to enact statutes which impose taxes on all businesses, including the press, in order to generate revenue so long as those laws operate even-handedly upon all similarly situated. (*Fox etc. Corp.* v. *City of Bakersfield* (1950) 36 Cal.2d 136, 142.) "The power to create classifications for taxation purposes is a broad one, within the discretion of the Legislature, and is subject only to limitations of the state and federal Constitutions." (*Festival Enterprises, Inc.* v. *City of Pleasant Hill, supra,* 182 Cal.App.3d at p. 963.)

Although plaintiffs recognize these general precepts of constitutional law, they contend that here the City has exceeded the limitations of its taxing power. Relying on *Minneapolis Star* v. *Minnesota Comm'r of Rev.* (1983) 460 U.S. 575 and *City of Alameda* v. *Premier Communications Network, supra,* 156 Cal.App.3d 148, plaintiffs claim that the structure of the City's business tax treats them differently than other similarly situated taxpayers and thus impermissibly impinges on their exercise of First Amendment rights.

In *Minneapolis Star,* the United States Supreme Court held a Minnesota use tax which applied to "publications" to be an unconstitutional burden on the press. While acknowledging decisions upholding economic regulations generally applicable to all businesses, the court concluded that "[d]ifferential taxation of the press . . . places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxa-

tion." (*Minneapolis Star* v. *Minnesota Comm'r of Rev., supra,* 460 U.S. 575, 585.)

The statute at issue in *Minneapolis Star* imposed a general sales tax on the sale of goods above a certain minimum price and a use tax on the "privilege of using, storing or consuming in Minnesota tangible personal property" which was not specifically exempt by statute and on which no sales tax was paid. As the court noted, this was a classic use tax designed to complement and protect the sales tax by eliminating a resident's incentive to travel to states with lower sales tax and purchase goods there rather than in Minnesota. Such taxes, in essence, require a resident who shops out of state to pay a "use tax" equal to the sales tax savings. The Minnesota statute provided an exemption from the sales tax for periodic publications, which the plaintiff, the Minneapolis Star & Tribune Company, had enjoyed from 1967 to 1971.

In 1971, the Minnesota Legislature amended the statute to impose a special use tax on the costs of ink and paper used in producing periodic publications, while leaving intact the publication's exemption from the sales tax. The amendment had the effect of creating the only situation in the entire tax scheme where components of goods that were later to be sold at retail were taxed. In all other situations, tax was assessed only when the finished product was purchased by the ultimate user. The only components taxed were ink and paper used in periodic publications. As a result, the tax fell exclusively upon the press. The statute was subsequently amended to exempt from the use tax the first $100,000 worth of ink and paper used in any calendar year by a publication so that, in practice, only a few publishers in the state were subjected to use taxation.

These unique features of the Minnesota use tax, not the mere fact that the press was being taxed, led the court to declare the amended statute unconstitutional. In doing so, however, the court stressed that "the states and the

federal government can subject newspapers to generally applicable economic regulations without creating constitutional problems. (*Minneapolis Star* v. *Minnesota Comm'r of Rev., supra,* 460 U.S. 575, 581.) The majority noted that "[a]ny tax that the press must pay, of course, imposes some 'burden.' But, as we have observed, [citation] this Court has long upheld economic regulation of the press. The cases approving such economic regulation, however, emphasized the general applicability of the challenged regulation to all businesses. . . . " (*Id.,* at p. 583.)

The Minnesota statute failed because it singled out the press for differential tax treatment. The only supporting rationale was the need for revenue -- a need which the court noted was better served by taxing all businesses equally. The law did not serve to complement the state's sales tax, as do most use tax statutes, since it imposed a use tax on publications which were specifically exempt by statute from the state's sales tax. The court emphasized, however, that had the tax been a generally applicable sales tax it would probably have been constitutionally permissible. Responding to the argument that the use tax was merely a less onerous, substitute tax which could be generally and permissibly applied to the press, the court held that the state had offered no adequate justification for the differential tax, which was impermissible even if it did not currently impose a greater effective burden since "the very selection of the press for special treatment threatens the press not only with the current *differential* treatment, but also with the possibility of subsequent differential *more burdensome* treatment." (*Id.,* at p. 588; emphasis in original.)[7]

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[7] The court also found that the statute was unconstitutional because the use tax, which exempted the first $100,000 of paper and ink used in any calendar year, unfairly targeted a limited number of publishers whose use of such products exceeded the exempt amount. Noting that no similar exemption existed for other small enterprises, the court held

In *City of Alameda* v. *Premier Communications Network, Inc., supra,* 156 Cal.App.3d 148, the Court of Appeal for the First District applied the rational of *Minneapolis Star* in striking down a local business license tax on television subscription service companies. Although the municipal ordinance at issue applied to eighty-seven types of businesses, only four were required to pay a gross receipts tax. Of these four, only two, television subscription and emergency communications services, were required to pay three percent of their gross receipts. Moreover, most businesses were permitted to pay an "in-lieu" gross receipts tax rather than the otherwise applicable tax set forth in the ordinance. Television subscription services, however, were not eligible to claim the in-lieu taxes. As a result, Premier's tax burden on its annual gross receipts of $210,000 was $8,300. If the company had been permitted to pay the in-lieu tax, its burden would have been only $472.

Concluding that only two types of businesses were required to pay three percent of gross receipts without any alternative, the court found the tax invalid, holding that Premier was taxed differently than the great majority of businesses and in a more burdensome manner. "Under the principles set forth in *Minneapolis Star,* the tax burden imposed upon Premier, a disseminator of protected speech, cannot stand unless that burden is necessary to achieve an overriding governmental interest. The only interest asserted to justify the differential tax burden is the generation of revenue. [Citation.] While that purpose is an interest critical to any government, it cannot, standing alone, justify special treatment of a segment of the media which disseminates protected speech when alternative means of achieving the same interest without implicating

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that "to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme." (*Minneapolis Star v. Minnesota Comm'r of Rev., supra,* 460 U.S. 575, 592.)

First Amendment concerns are available. [Citation.]" (*City of Alameda* v. *Premier Communications Network, Inc., supra,* 156 Cal.App.3d 148 156.)

The municipal ordinance here does not possess the constitutional infirmities that were present in either *Minneapolis Star* or *Premier Communications.* Although the City's tax is levied upon the privilege of engaging in or transacting business, it is, on its face, and in fact, a tax for revenue purposes only, and does not grant or take away any right to do business. The tax is neither special nor unique and is generally applicable to all those engaged in wholesale or retail business activities. In no way does the tax resemble a penalty directed at only a few publications. (Cf. *Arkansas Writers' Project, Inc.* v. *Ragland (1987)* ___ U.S___ .) The press is not singled out for differential treatment since the tax rates established by the ordinance apply to all manufacturers and sellers alike, including publishers.

Plaintiffs nevertheless argue that both *Minneapolis Star* and *Premier Communications* stand for the proposition that all First Amendment activities must be taxed at the same rate and that there must be parity between First Amendment and non-First Amendment businesses. Neither the cases cited nor the constitution mandate such requirements.

Plaintiffs' challenge, which is couched in terms of equal protection, must stand or fall with the novel proposition that a municipality is powerless to employ more than one method of computing taxes for various businesses unless it can demonstrate some compelling justification for doing so. Although those engaged in protected speech may not be singled out for discriminatory tax treatment in the absence of counterbalancing governmental interest of compelling importance that cannot be achieved without differential taxation (*Festival Enterprises, Inc.* v. *City of Pleasant Hill, supra,* 182 Cal.App.3d 960, 964; *City of*

Alameda v. *Premier Communications Network, Inc., supra,* 156 Cal.App.3d 148, 153), no such counterbalancing interest need be present when the tax measure does not result in a discriminatory burdening of First Amendment rights. (*Vance* v. *Bradley* (1979) 440 U.S. 93; *Fox etc. Corp.* v. *City of Bakersfield, supra,* 36 Cal.2d 136, 141-142.)

Having determined that the City's ordinance does not impose a peculiar or differential burden on plaintiffs' businesses in violation of the First Amendment, we must only determine whether the varying rates established by the taxing scheme are "founded on natural, intrinsic or fundamental distinctions which are reasonable in their relation to the object of the legislation. . . ." (*Fox etc. Corp.* v. *City of Bakersfield, supra,* 36 Cal.2d at p. 142.)

The power of a municipality to classify for the purpose of taxation is very broad. Neither due process nor equal protection impose a rigid rule of equality in tax legislation. (*Henry's Restaurants of Pomona, Inc.* v. *State Bd. of Equalization* (1973) 30 Cal.App.3d 1009, 1016, and cases cited therein.) "It is well settled that occupations and businesses may be classified and subdivided for purposed of taxation, and it is within the discretion of the Legislature to exact different license taxes from different classes or subclasses of businesses, subject only to the limitations of the state and federal Constitutions in regard to equal protection of the laws. No constitutional rights are violated if the burden of the license tax falls equally upon all members of a class, though other classes have lighter burdens or are wholly exempt, provided that the classification is reasonable, based on substantial differences between the pursuits separately grouped, and is not arbitrary." (*Fox etc. Corp.* v. *City of Bakersfield, supra,* at p. 142; *Gutknecht* v. *City of Sausalito* (1974) 43 Cal.App.3d 269, 276; *Associated Home Builders etc., Inc.* v. *City of Newark* (1971) 18 Cal.App.3d 107, 109-110; *Clark* v. *City of San Pablo* (1969) 270 Cal.App.2d 121, 126-127.)

The power to license for purposes of generating revenue involves the right to make distinctions between different trades and between essentially different methods of conducting the same general character of business. (*See City of Los Angeles* v. *Crawshaw Mortgage & Inv. Co.* (1975) 51 Cal.App.3d 696, 703.)[8] "It is recognized that a legislative body may classify and subdivide classes within those engaged in one generic field of activity where there is a reasonable basis for such action. [Citations.]" (*Clark* v. *City of San Pablo, supra,* at p. 131.)

The classifications created by the City's taxing scheme are anything but arbitrary or unreasonable. On its face the ordinance purports to impose a tax on "every person manufacturing and selling goods, wares, or merchandise" at both the wholesale and retail levels. (L.A.M.C. §§ 21.166, 21.167.) Independent contractors and those engaged in the rental of tangible personal property also are taxed at specified rates. (L.A.M.C. §§ 21.190, 21.192.) By amendment,

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[8] The U.S. Supreme Court's observations in *Regan* v. *Taxation With Representation of Wash.* (1983) 461 U.S. 540, 547-548 are particularly applicable here: "Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes. More than 40 years ago we addressed these comments to an equal protection challenge to tax legislation: 'The broad discretion as to classifications possessed by a legislature in the field of taxation has long been recognized. . . . [T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.' [Citation.]"

newspapers and other periodicals are classified as "goods, wares, or merchandise" while publishing and printing are categorized as "manufacturing."

These various distinctions flow naturally from differences in the methods and procedures used in conducting the business activities subject to the ordinance and thus afford an acceptable basis for imposing disparate rates of taxation. (See *Alco Plating Corp.* v. *City of Los Angeles* (1974) 39 Cal.App.3d 948, 951-952.) Within each broad classification, however, all businesses are taxed similarly.

Even a cursory review of the law reveals that all members of the press are treated alike; that the press and all other publishing enterprises are treated similarly; and that all publishing enterprises are treated identically with other wholesalers and retailers. The City has not created an artificial class of businesses in order to tax some who are engaged in the same business and not others. The amount of plaintiffs' tax is determined by no means other than by the amount of their business activities. (See *City of Los Angeles* v. *Lankershim* (1911) 160 Cal. 800, 804.)

Plaintiffs' argument that the municipal tax scheme is unconstitutional because the City has chosen to use a different method of computing the tax levied against motion picture production than it has for newspaper publication or radio and television broadcasting is unpersuasive. The inherent difference between these various forms of mass media is patent. These differences are reflected in the ways in which the ultimate product is conceived, produced, disseminated, and exhibited.

Plaintiffs nonetheless maintain that they should be required to pay no more in taxes than a film producer with the same gross receipts. They have not shown, nor can they show, that a producer, in making a film, operates in a manner similar to a business which manufactures and sells daily newspapers or to any other retailer or wholesaler. Plaintiffs' analysis also ignores the fact that the

motion picture industry is highly fragmented (see e.g., *United States* v. *Paramount Pictures* (1948) 334 U.S. 131) and that the City separately classifies and taxes each of these various fragments as different business activities.[9]

Even if the cap on the amount of tax imposed on motion picture production is viewed as a subsidy of that business, it would not afford plaintiffs a basis for attacking the tax scheme. If the state subsidizes some First Amendment activity but not all, no subject classification is created. Conversely, the failure "to subsidize the exercise of a fundamental right does not infringe [that] right." (*Regan* v. *Taxation with Representation of Wash., supra,* 461 U.S. 540, 549.)

Furthermore, occupations and businesses, including the entertainment industry, may be properly subdivided and separately classified if the classification is founded on natural, intrinsic or fundamental distinctions which are reasonable in their relation to the object of the legislation. (See *City of Berkeley* v. *Oakland Raiders* (1983) 143 Cal.App.3d 636, 639; *United Business Com.* v. *City of San Diego* (1979) 91 Cal.App.3d 156, 178.) In other words, the classification within the ordinance does not violate equal protection "if the distinction rests upon a rational basis, and it must be presumed to rest on that basis if there is any conceivable state of facts which would support it." (*City of San Jose* v. *Donohue* (1975) 51 Cal.App.3d 40, 45.)

We conclude that the tax rate distinctions which may exist between different members of the media and between the media and other taxpayers are constitutionally permissible and in no way impinge on the exercise of plaintiffs' rights under the First Amendment.

Next we reject plaintiffs' contention that the ordinance is unconstitutional on its face because it grants the city

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[9] Motion picture production is taxed by L.A.M.C. section 21.109; distribution (vis-a-vis sales) by sections 21.166 and 21.167; exhibition by section 21.147; and rentals by section 21.192.

clerk absolute discretion in apportioning the amount of gross receipt taxes to be collected from businesses engaged in protected First Amendment activities. Apportionment is required to prevent the tax from having an extraterritorial impact.

L.A.M.C. section 21.15(h) provides in relevant part: "When, by reason of the provisions of the Constitution of the United States or the Constitution of California, the business tax imposed by this Article cannot be enforced without there being an apportionment according to the amount of business done in the City of Los Angeles, or in the State of California, as the case may be, the City Clerk may make such rules and regulations for the apportionment of the tax as are necessary or desirable to overcome the constitutional objections." Pursuant to the authority granted him by this section, the city clerk adopted Tax Rulings Nos. 13 and 14 for the apportionment of gross receipts of taxpayers subject to sections 21.166 and 21.167. Each is applicable to all businesses classified as either a wholesaler or retailer, including those engaged in the business of publishing or publishing and printing. The rulings essentially provide for an apportionment formula based upon various specified physical elements[10] and

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[10] Pursuant to Rule No. 13, the measure of tax for "a person who does not own, lease, occupy or otherwise maintain within the City of Los Angeles a place or premises upon which or from which he engages in business" is as follows: "(a) 35% of those gross receipts from all sales to customers located within the City of Los Angeles, where delivery or shipment is made to points within the City by vehicles operated by the taxpayer. (b) 30% of those gross receipts from all sales to customers located within the City of Los Angeles where delivery or shipment is made to points within the City by means other than vehicles operated by the taxpayer regardless of the f.o.b. point or other conditions of sale. (c) 30% of those gross receipts from all sales to customers located within the City of Los Angeles where delivery or shipment is made to points outside the City."

Under Rule No. 14, the measure of tax for "[a] person who man-

further provide that any taxpayer who believes that the percentages do not apply to his or her particular business

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ufactures any goods, wares, or merchandise within the City of Los Angeles" is "the total gross receipts from the sale of goods manufactured in the City." The regulation further provides that "[a] person who owns, leases, occupies or otherwise maintains within the City a place or premises upon which, or from which he engages in the business of selling goods, wares, and merchandise, *not manufactured by the taxpayer in the City and whose gross receipts from such sales are attributable to business activities carried on within the City and activities carried on outside the City*, may apportion such gross receipts *directly attributable* to activities carried on within the City. [] In making a calculation of gross receipts to be reported as the measure of tax, the person may deduct from 100% of gross receipts the percentage of gross receipts deemed to be directly attributable to selling activities carried on by such person outside the City of Los Angeles. For the purpose of this calculation, the person may deduct . . . the following percentages of those sales, or particular categories of sales, on which the corresponding elements of the selling process are performed at a place or location outside the City:

"1. Up to 30% for the location where the sale is negotiated or solici ed by the taxpayer, through the physical presence of himself, his employees or his agents.

"2. Up to 20% for the sales office which serves as the base of operations for sales activities, or if there is no sales office which serves as a base of operations, the office from which the sale activities are directed or controlled.

"3. Up to 10% for the location where orders or contracts are accepted or approved. Such acceptance or approval shall be deemed to take place at the location of the office specified in item 2 above, unless there is clear and conclusive evidence that a binding acceptance of approval occurs elsewhere.

"4. Up to 20% for any facility, operated by the taxpayer, where the goods, wares or merchandise are stored immediately prior to shipment or delivery.

"5. Up to 5% for the location which gives the order for, or arranges for, the shipment or delivery of articles sold.

"6. Up to 5% for the place where billing procedures are performed.

"7. Up to 5% for the place where the collecting of receipts is per-

may petition the city clerk for a modification of the formula. The taxpayer has the burden of establishing the modification.

Relying on a series of United States Supreme Court decisions which hold that a public official may not be granted unfettered discretion to deny or regulate the issuance of licenses or permits, thus limiting or restricting access to protected speech (see e.g., *Shuttlesworth* v. *Birmingham* (1969) 394 U.S. 147; *Kunz* v. *New York* (1951) 340 U.S. 290; *Schneider* v. *State* (1939) 308 U.S. 147), plaintiffs argue that the City's ordinance infringes upon their First Amendment rights by giving the city clerk blanket authority to prescribe formulas for the apportionment of taxes. Plaintiffs' reliance on these cases is totally misplaced.

The business tax with which we are here concerned is strictly a revenue measure. While a registration certificate is required by L.A.M.C. section 21.03, no conditions are placed upon the right to such a document. The certificate is required not to regulate but to expedite the collection of revenue. (See *City of Los Angeles* v. *A.E.C. Los Angeles, supra*, 33 Cal.App.3d 933, 940.) Plaintiffs nonetheless contend that "it is difficult to see any distinction between a 'licensing' ordinance and the City Tax Ordinance as written" apparently because of the various provisions of the law relating to enforcement procedures. These procedures, however, do nothing more than insure the collection and remittance of the tax and assure that accounting and record keeping standards are properly maintained. Such regulations are necessary adjuncts to the municipal taxing power and in no manner restrict access to protected speech.[11]

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formed.

"8. Up to 5% for the place to which merchandise is delivered, by vehicles operated by the taxpayer." (Emphasis added.)

[11] Much of plaintiffs' argument relates to L.A.M.C. section 21.189.2.

The argument that section 21.15(h) is unconstitutional because it does not provide any formula, rule or specific standard for the apportionment of gross receipts is equally unavailing. It has long been established that a legislative body need not prescribe the exact means by which a tax is to be fixed but may delegate to its taxing officers the power to adopt a suitable method. (*El Dorado Oil Works* v. *McColgan* (1950) 34 Cal.2d 731, 737-738; *Pacific Fruit Express Co.* v. *McColgan* (1944) 67 Cal.App.2d 93, 101-102.) "The essential requirement is the Legislature's specification of a standard -- 'an intelligible principle to which the person or body authorized to [administer the act] is directed to conform' [citation] -- but it may leave to the administrative agency the precise determination necessary to bring the standard into operation." (*El Dorado Oil*

That section, however, pertains only to radio and television broadcasters and, by its very terms, has no application to the publication of newspapers or other printed matter. Subdivisions (c) and (d) provide as follows: "When gross receipts are constitutionally required to be apportioned and are derived from or attributable to activities engaged in within and without the City, gross receipts shall be apportioned in a manner that is fairly calculated to determine the amount of gross receipts derived from or attributable to engaging in business in the City. Such apportionment shall be made on the basis of payroll, value and situs of tangible property, general expense, or by reference to any of these or other factors, or by any other method of apportionment as will fairly determine the amount of gross receipts derived from or attributable to engaging in business in the City. Gross receipts derived from or attributable to sources within the City shall include gross receipts from any activities carried on in this City. (d) Notwithstanding the foregoing, gross receipts used in the measurement of the tax under this section shall be limited to receipts which are generated, produced, or attributable to local activities, in the State of California."

So far as we can discern, the city clerk has not promulgated any formulae for the apportionment of taxes levied under section 21.189.2. Were it necessary to so decide, we would have no difficulty in concluding that the city council's delegation of authority comports with the principles discussed *infra*. Since plaintiffs are in the publishing, not broadcasting business and are in no way subject to the provisions of section 21.189.2, we need not address this issue in the contest of this case.

Works v. *McColgan, supra,* 34 Cal.2d 731, 738.) Section 25.12(h) surely complies with this principle by directing the city clerk to make "such rules and regulations for the apportionment of the tax as are necessary or desirable" to satisfy the demands of both the federal and state constitutions. (Cf. *El Dorado Oil Works* v. *McColgan, supra,* 34 Cal.2d 731).

Citing to *Big Mama Rag, Inc.* v. *United States* (1980 D.C. Cir.) 631 F.2d 1030, plaintiffs appear to argue that the apportionment formulae set forth in Tax Rulings Nos. 13 and 14 must fall before the First Amendment unless the classifications established by the clerk can be justified by a compelling state interest. We disagree.

In *Big Mama Rag, Inc.,* a newspaper's application for tax exempt status was denied because it could not qualify as an "educational institution" as that term had been defined by an Internal Revenue Service regulation. Finding that the definition was overly vague and that the subjective criteria used to evaluate the application was based upon the content of protected speech, the court struck down the regulation as unconstitutional. In so holding the court observed: "[R]egulations authorizing tax exemption may not be so unclear as to afford latitude for subjective application by IRS officials. . . . (*Id.,* at p. 1034). Applications for tax exemption must be evaluated . . . on the basis of criteria capable of neutral application. The standards may not be so imprecise that they afford latitude to individual IRS officials to pass judgment on the content and quality of an applicant's views and goals and therefore to discriminate against those engaged in protected First Amendment activities." (*Id.,* at p. 1040.)

The distinction between apportionment and the granting or withholding of a tax exemption is obvious. The city council here has not delegated to the clerk the authority to decide who pays the business tax or when. That official merely determines the manner in which the tax is to be

computed based upon objective criteria that is content neutral and relates only to the amount of revenue generated within the City.

Although the formulation of the criteria requires the exercise of judgment, abuses of such judgment are checked both by extensive administrative review and by prompt post-determination access to the courts. Contrary to the arguments advanced by plaintiffs, neither L.A.M.C. section 21.15(h) nor the clerk's tax rulings impose any burden on the exercise of their First Amendment rights. We find no indication that the regulations were intended to suppress any ideas or any demonstration that they have had that effect. Under the circumstances, the various classifications established by the rulings need not be justified by the showing of a compelling state interest.

There is no constitutional prohibition against local taxes upon businesses "doing business" both within and outside the taxing jurisdiction so long "as such taxes are apportioned in a manner by which the measure of tax fairly reflects that proportion of the taxed activity which is actually carried on within the taxing jurisdiction. . . . " (*City of Los Angeles* v. *Shell Oil Co.* (1971) 4 Cal.3d 108, 124; *City of Los Angeles* v. *London Towne Livery Service, Ltd.* (1979) 97 Cal.App.3d 814, 816-817.) Here, the promulgation of the tax rulings constitute a permissible exercise of administrative discretion that fully carries out the intent of the city council. They describe, in a detailed fashion, the manner in which taxes are to be apportioned according to the amount of business activity done within and without the city. The various formulae set forth in the regulations cannot be characterized as arbitrary, capricious or patently unreasonable. As such, we need not inquire further into the clerk's exercise of authority properly delegated to him by the city council.

We have thoroughly considered plaintiffs' remaining arguments and find none that warrant further consideration.

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

/s/COMPTON, ACTING P.J.
COMPTON

We concur:

/s/GATES, J.
GATES

/s/FUKOTO, J.
FUKOTO

APPENDIX B

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 2, No. B023000 S001449

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

TIMES MIRROR COMPANY et al
v.
CITY OF LOS ANGELES

SUPREME COURT
FILED
SEP 3 1987
LAURENCE P. GILL, CLERK
DEPUTY

Appellants' petition for review DENIED.

Mosk, J., is of the opinion the petition should be granted.

LUCAS
Chief Justice

APPENDIX C

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE SECOND APPELLATE DISTRICT
DIVISION: 2

Gibson, Dunn & Crutcher
Rex S. Heinke
333 So. Grand Ave.

Los Angeles, CA 90071

RP: Times Mirror Company, The, Et. Al.
vs.
Los Angeles, City of, Et Al.
2 Civil B023000
Los Angeles No. C511941

*** * REMITTITUR NOTICE * ***

Notice is hereby given that the Remittitur has been issued this date and that the opinion, decision or order entered in the above entitled cause of 05/28/87 is now final.

* * Affirmed In Full * *

---Appellant ✓ Respondent to recover costs.
---Each party to bear own costs.
---Costs are not awarded in this proceeding.

CLAY ROBBINS, JR., Clerk
OCTOBER 2, 1987
By:
Deputy Clerk

APPENDIX D

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

Civil No. B 023000

(Superior Court No. C 511941)

THE TIMES MIRROR COMPANY, TRIBUNE NEWSPAPERS WEST, INC., AND LOZANO ENTERPRISES,

Plaintiffs,

vs.

THE CITY OF LOS ANGELES, and DOES 1 through 50, inclusive,

Defendants

CLERK'S OFFICE
COURT OF APPEAL—SECOND DIST.
RECEIVED
NOV 18 1987
ROBERT N. WILSON, Clerk

NOTICE OF APPEAL

Plaintiffs The Times Mirror Company, Tribune Newspapers West, Inc., and Lozano Enterprises appeal to the United States Supreme Court, pursuant to 28 U.S.C. §1257(2), from the Order of May 28, 1987 affirming judgment against plaintiffs and in favor of defendant The City of Los Angeles.

DATED: November 17, 1987

GIBSON, DUNN & CRUTCHER
REX S. HEINKE

WILLIAM C. FOUTZ
KELLI L. SAGER

THE TIMES MIRROR COMPANY
WILLIAM A. NIESE
JEFFREY S. KLEIN

HUFSTEDLER, MILLER, CARLSON & BEARDSLEY
FRED L. LEYDORF

SHEPPARD, MULLIN, RICHTER & HAMPTON
FRANK SIMPSON III
KATHLEEN A. O'BRIEN

By:/s/Rex S. Heinke
Rex S. Heinke

Attorneys for Plaintiffs
The Times Mirror Company, Tribune Newspapers West, Inc., and Lozano Enterprises

PROOF OF SERVICE BY MAIL - 1013a, 2015.5 C.C.P.

JANET FARAGHER certifies as follows:

I am a citizen of the United States and am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 333 South Grand Avenue, Los Angeles, California 90071, in said County and State; on the 18th day of November, 1987, I served the within:

NOTICE OF APPEAL

on the parties in this action, by placing a true copy thereof in an envelope addressed to attorneys of record, addressed as follows:

SEE ATTACHED SERVICE LIST

and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the mail at Los Angeles, California; that there is a regular communication between the place of mailing and the place so addressed.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on November 18, 1987, at Los Angeles, California.

/s/JANET FARAGHER Declarant
JANET FARAGHER

SERVICE LIST

Richard A. Dawson, Esq.
Assistant City Attorney
1800 City Hall East
Los Angeles, CA 90012

Hon. John L. Cole
Los Angeles Superior Court
111 N. Hill Street
Los Angeles, CA 90012

Clerk
Supreme Court of the State of California
3580 Wilshire Blvd., Room 213
Los Angeles, CA 90010

APPENDIX E

SEC.21.15 CITY CLERK - DUTY TO ENFORCE - POWERS - RULES AND REGULATIONS:

(a) Duty to Enforce. It shall be the duty of the City Clerk, and he is hereby directed, to enforce each and all of the provisions of this Article and Article 1.5, and the Chief of Police shall render such assistance in the enforcement of this Article and Article 1.5 as may from time to time be required by the City Clerk.

(b) Inspection and Examination of Places of Business. The City Clerk in the exercise of the duties imposed upon him, and acting through his deputies, shall inspect and examine all places of business in the City to ascertain whether or not the provisions of this Article and Article 1.5 have been complied with.

(c) Audit and Examination of Records and Equipment. The City Clerk and the City Controller, and deputies of each of them, shall have the power to audit and examine all books and records, and where necessary, all equipment, of any person engaged in business in the City for the purpose of ascertaining the amount of business tax, sales or use tax, if any, required to be paid by the provisions hereof, and for the purpose of verifying the statements, or any item thereof, when filed by any taxpayer pursuant to the provisions of Secs. 21.13, 21.14 or 21.199, or Article 1.5. If such person, after written demand by the City Clerk or City Controller, or a deputy of either, refuses to make available for audit, examination or verification such books, records or equipment as the City Clerk, City Controller, or deputy of either, request, the City Clerk may, after full consideration of all information within his knowledge concerning the business and activities of the person so refusing, make an assessment in the manner provided in Sec. 21.16 of any taxes estimated to be due.

(d) Inspection of Registration Certificates, etc. The City Clerk and all of his deputies shall have the power and authority to enter, free of charge, during business hours, any place of business required to be registered and taxed by the provisions of this Article or Article 1.5, and to demand exhibition of a business registration certificate and sales or use tax permit and evidence of amount of tax paid. Any person having any such business tax registration certificate, or sales or use tax permit, heretofore issued in his possession or under his control who fails to exhibit the same as well as evidence of amounts of tax paid on demand shall be guilty of a misdemeanor and subject to the penalty provided for by the provisions of this Code.

(e) Extensions of Time for Filing. The City Clerk may, upon receipt of the written request of a taxpayer, and for good cause, extend the time for filing any statement required under the provisions of Section 21.13, 21.14 or 21.199, or Article 1.5 for a period of not to exceed 45 days, provided that the time for filing the required statement has not already passed when the request is received. No penalty for delinquent payment shall accrue by reason of such extension. Interest shall accrue during said extension in the manner provided herein.

(f) Compromise of Claims. The City Clerk, with the written approval of the City Attorney and subject to the provisions of the Charter, may compromise a claim for business, sales and use taxes where the portion of the claim proposed to be released is less than $5,000.00; and with the approval of the City Attorney and the City Council, may compromise such a claim where the portion proposed to be released amounts to $5,000.00 or more. (Amended by Ord. No. 152,158, Eff. 5/10/79.)

(g) Minor Errors in Payment. In the event a discrepancy exists between the amount of tax paid and the amount of tax due under this Article or Article 1.5, resulting in the underpayment or overpayment of the tax in an amount of

$3.00 or less, the City Clerk may accept and record such underpayment or overpayment without other notification to the taxpayer.

(h) Rules and Regulations-Appointment. The City Clerk may make such rules and regulations as are not inconsistent with the provisions of this Article or Article 1.5 as may be necessary or desirable to aid in the enforcement of the provisions of this Article and Article 1.5. When, by reason of the provisions of the Constitution of the United States or the Constitution of California, the business tax imposed by this Article cannot be enforced without there being an apportionment according to the amount of business done in the City of Los Angeles, or in the State of California, as the case may be, the City Clerk may make such rules and regulations for the apportionment of the tax as are necessary or desirable to overcome the constitutional objections. Such rules and regulations shall be approved by the City Attorney prior to becoming effective.

SEC.21.109 MOTION PICTURES AND CARTOONS.

(a) For the purpose of this section a motion picture producer is a person who engages in the business of producing motion pictures or photoplays, or making or producing motion pictures or photoplays in which cartoons are used instead of actors. Said business includes the development of a screen story, whether based on fact or fiction, the photographing of said story, whether by means of photographic film, magnetic tape, or other device, and the cutting, scoring, editing, and final preparation of the picture for release, and when performed by a person engaged in the foregoing activities described in this subsection also includes either or both of the following:

1. The lending by a motion picture producer of the services of employees for which the producer has contracted to one or more other motion picture producers; and

HM12. The furnishing of motion picture studio facilities to other motion picture producers to produce motion pictures where the facilities include, in addition to physical equipment, the services of technicians such as cameramen, soundmen, carpenters, electricians and set decorators.

Every person engaged in the business of being a motion picture producer shall pay a tax in the amount provided in subsection (c). The measure of the tax in each instance shall be the total of the following sums: the gross cost of production of motion pictures and photoplays produced by the motion picture producer, the gross receipts received by the motion picture producer in return for the lending of the services of his employees as described herein, and the gross receipts received by the motion picture producer in return for the furnishing of motion picture studio facilities in the manner described herein.

(b)Every person engaged in the business of reconstructing motion pictures by synchronizing pictures with sound, or making or producing sound scores, other than a sound score made or produced by a motion picture producer in the preparation for release of a motion picture produced by him, shall pay a tax measured by the gross cost of the work done in the amount provided in subsection(c).

(c) (Amended by Ord. No. 159,384, Eff. 11/8/84.) The taxes charged for the privilege of engaging in the businesses described in this section are as follows:

Where the measure of the tax is less than $50,000.00, the tax shall be $125.00 per year;

Where the measure of the tax is $50,000.00 or more, and less than $100,000.00 the tax shall be $250.00 per year;

Where the measure of the tax is $100,000.00 or more, and less than $200,000.00, the tax shall be $500.00 per year.

Where the measure of the tax is $200.000.00, or more, and less than $300,000.00, the tax shall be $750.00 per year;

Where the measure of tax is $300,000.00 or more, and less than $400,000.00, the tax shall be $1,000.00 per year;

Where the measure of the tax is $400,000.00 or more, and less than $500,000.00, the tax shall be $1,250.00 per year;

Where the measure of tax is $500,000.00 or more, and less than $600,000.00, the tax shall be $1,500.00 per year;

Where the measure of tax is $600,000.00 or more, and less than $700,000.00, the tax shall be $1,750.00 per year;

Where the measure of the tax is $700,000.00 or more, and less than $800,000.00, the tax shall be $2,000.00 per year;

Where the measure of the tax is $800,000.00 or more, and less than $900,000.00, the tax shall be $2,250.00 per year;

Where the measure of the tax is $900,000.00 or more, and less than $1,000,000.00, the tax shall be $2,500.00 per year;

Where the measure of the tax is $1,000,000.00 or more, and less than $1,100,000.00, the tax shall be $2,750.00 per year;

Where the measure of the tax is $1,100,000.00 or more, and less than $1,200,000.00 the tax shall be $3,000.00 per year;

Where the measure of the tax is $1,200,000.00 or more, and less than $1,300,000.00, the tax shall be $3,250.00 per year;

Where the measure of the tax is $1,300,000.00 or more, and less than $1,400,000.00, the tax shall be $3,500.00 per year;

Where the measure of the tax is $1,400,000.00 or more, and less than $1,500,000.00, the tax shall be $3,750.00 per year;

Where the measure of the tax is $1,500,000.00 or more, and less than $1,600,000.00, the tax shall be $4,000.00 per year;

Where the measure of the tax is $1,600,000.00 or more, and less than $1,700,000.00, the tax shall be $4,250.00 per year;

Where the measure of the tax is $1,700,000.00 or more, and less than $1,800,000.00, the tax shall be $4,500.00 per year;

Where the measure of the tax is $1,800,000.00 or more, and less than $1,900,000.00, the tax shall be $4,750.00 per year;

Where the measure of the tax is $1,900,000.00 or more, and less than $2,000,000.00, the tax shall be $5,000.00 per year;

Where the measure of the tax is $2,000,000.00 or more, and less than $2,100,000.00, the tax shall be $5,250.00 per year;

Where the measure of the tax is $2,100,000.00 or more, and less than $2,200,000.00, the tax shall be $5,500.00 per year;

Where the measure of the tax is $2,200,000.00 or more, and less than $2,300,000.00, the tax shall be $5,750.00 per year;

Where the measure of the tax is $2,300,000.00 or more, and less than $2,400,000.00, the tax shall be $6,000.00 per year;

Where the measure of the tax is $2,400,000.00 or more, and less than $2,500,000.00, the tax shall be $6,250.00 per year;

Where the measure of the tax is $2,500,000.00 or more, and less than $2,600,000.00, the tax shall be $6,500.00 per year;

Where the measure of the tax is $2,600,000.00 or more, and less than $2,700,00.00, the tax shall be $6,750.00 per year;

Where the measure of the tax is $2,700,000.00 or more, and less than $2,800,000.00, the tax shall be $7,000.00 per year;

Where the measure of the tax is $2,800,000.00 or more, and less than $2,900,000.00, the tax shall be $7,250.00 per year;

Where the measure of the tax is $2,900,000.00 or more, and less than $3,000,000.00, the tax shall be $7,500.00 per year;

Where the measure of the tax is $3,000,000.00 or more, and less than $3,100,000.00, the tax shall be $7,750.00 per year;

Where the measure of the tax is $3,100,000.00 or more, and less than $3,200,000.00, the tax shall be $8,000.00 per year;

Where the measure of the tax is $3,200,000.00 or more, and less than $3,300,000.00, the tax shall be $8,250.00 per year;

Where the measure of the tax is $3,300,000.00 or more, and less than $3,400,000.00, the tax shall be $8,500.00 per year;

Where the measure of the tax is $3,400,000.00 or more; and less than $3,500,000.00, the tax shall be $8,750.00 per year;

Where the measure of the tax is $3,500,000.00 or more; and less than $3,600,000.00, the tax shall be $9,000.00 per year;

Where the measure of the tax is $3,600,000.00 or more, and less than $3,700,000.00, the tax shall be $9,250.00 per year;

Where the measure of the tax is $3,700,000.00 or more, and less than $3,800,000.00, the tax shall be $9,500.00 per year;

Where the measure of the tax is $3,800,000.00 or more, and less than $3,900,000.00, the tax shall be $9,750.00 per year;

Where the measure of the tax is $3,900,000.00 or more, and less than $4,000,000.00, the tax shall be $10,000.00 per year;

Where the measure of the tax is $4,000,000.00 or more, and less than $4,100,000.00, the tax shall be $10,250.00 per year;

Where the measure of the tax is $4,100,000.00 or more, and less than $4,200,000.00, the tax shall be $10,500.00 per year;

Where the measure of the tax is $4,200,000.00 or more, the tax shall be $10,750.00 per year.

SEC.21.147. THEATER:

For every person engaged in the business of conducting a theatre containing a permanent stage upon which movable scenery and theatrical appliances are used, where regular theatrical or vaudeville performances are given and for the privilege of viewing which a fee is charged, collected or received, or conducting, managing or carrying on a moving picture theatre or drive-in theatre, where moving pictures are exhibited and a fee is charged, collected or received, or conducting, operating or promoting any entertainment, show or exhibition not otherwise required to pay a tax therefor under other provisions of this Article, where an admission fee is charged, collected or received, or where no admission fee is charged, collected

or received but donations of any kind or character are solicited or accepted, the tax shall be $18.75 per year or fractional part thereof for the first $15,000.00 or less of gross receipts, plus $1.25 per year for each additional $1,000.00 of gross receipts or fractional part thereof in excess of $15,000.00; provided that in connection with any entertainment, show or exhibition if no admission fee is charged, collected or received, and no donations of any kind or character are solicited or accepted, or if the person conducting, operating or presenting the entertainment, show or exhibition taxed under this section is a person mentioned in subdividion 4 subsection (c) of Section 21.190 of this Code, or if the person is a strolling musician who performs on sidewalks, in parks and similar publicly owned places where no admission fee is charged, collected or received, even though donations are solicited and collected, no tax shall be required to be paid therefor by such person. (Amended by Ord. No. 159,384, Eff. 11/8/84.)

SEC.21.166. MERCHANDISE WHOLESALE SELLING:

(a) For every person manufacturing and selling any goods, wares or merchandise at wholesale, or selling any goods, wares or merchandise at wholesale, and not otherwise specifically taxed by other provisions of this Article, the tax shall be $20.00 per year or fractional part thereof for the first $20,000.00 or less of gross receipts, plus $1.00 per year for each additional $1,000.00 of gross receipts or fractional part thereof in excess of $20,000.00; provided that blind persons need not include the first $20,000.00 of gross receipts in the computation of the amount of tax due hereunder, nor be required to pay the minimum tax of $20.00. This exemption shall not subject such blind person to the provisions of Section 21.190 of this Code. (Amended by Ord. No. 140,833, Operative 1/1/71.)

(b) For the purpose of this section, a wholesale sale or sale at wholesale means a sale of goods, wares or merchandise for the purpose of resale in the regular course of business.

(c) Whenever a person engages at the same location in two or more business of the kind taxed in this section, a joint Registration Certificate shall be issued for all such businesses and the tax shall be measured by the sum of the gross receipts of all such businesses so conducted.

(d) A blind person, within the meaning of this section, shall mean a person having not more than ten percent visual acuity in the better eye, with correction. Such blindness shall be certified by a licensed physician and surgeon who specializes in diseases of the eye, or by the Bureau of Vocational Rehabilitation of the Department of Education of the State of California, and the exemption provided by this section shall not apply until a certificate as to such blindness shall be furnished to the City Clerk.

(e) No tax hereunder shall be required to be paid by any nonprofit wholly retailer owned food cooperative by reason of its sales to its owner-members. (Added by Ord. No. 144,090, Eff. 12/16/72.)

(f) For the purpose of this section, newspapers, magazines, periodicals, books and other printed matter shall be deemed to be included in the term "goods, wares or merchandise"; publishing or publishing and printing shall be deemed to be included in the term "manufacturing"; and the term "gross receipts" shall mean California receipts from the selling or furnishing of advertising or advertising space in printed matter in addition to California receipts from the sale of goods, wares and merchandise. The provisions of this subsection shall apply only to business tax periods commencing on or after January 1, 1984. (Added by Ord. No. 158,484, Eff. 12/29/83.)

SEC.21.167. MERCHANDISE-RETAIL SELLING:

(a) For every person manufacturing and selling any goods, wares or merchandise at retail or selling any goods, wares or merchandise at retail, and not otherwise specifically taxed by other provisions of this Article, the tax shall be $18.75 per year or fractional part thereof for the

first $15,000.00 or less of gross receipts, plus $1.25 per year for each additional $1,000.00 of gross receipts or fractional part thereof in excess of $15,000.00; provided that blind persons need not include the first $15,000.00 of gross receipts in the computation of the amount of tax due hereunder nor be required to pay the minimum tax of $18.75. This exemption shall not subject such blind person to the provisions of Section 21.190 of this Code. (Amended by Ord. No. 140,833, Operative 1/1/71.)

(b) For the purpose of this section, a retail sale or sale at retail means a sale of goods, wares or merchandise for any purpose other than resale in the regular course of business.

(c) Whenever a person engages at the same location in two or more businesses of the kind taxed in this section, a joint Registration Certificate shall be issued for all such businesses and the tax shall be measured by the sum of the gross receipts of all such businesses so conducted.

(d) A blind person, within the meaning of this section shall mean a person having not more than ten percent visual acuity in the better eye, with correction. Such blindness shall be certified by a licensed physician and surgeon who specializes in diseases of the eye, or by the Bureau of Vocational Rehabilitation of the Department of Education of the State of California, and the exemption provided by this section shall not apply until a certificate as to such blindness shall be furnished to the City Clerk.

(e) For the purpose of this section, newspapers, magazines, periodicals, books and other printed matter shall be deemed to be included in the term "goods, wares or merchandise"; publishing or publishing and printing shall be deemed to be included in the term "manufacturing"; and the term "gross receipts" shall mean California receipts from the selling or furnishing of advertising or advertising space in printed matter in addition to California receipts from the sale of goods, wares or merchandise. The pro-

visions of this subsection shall apply only to business tax periods commencing on or after January 1, 1984. (Added by Ord. No. 158,484, Eff. 12/29/83.)

(f) EXEMPTION FOR VENDORS AT A SWAP MEET: The provisions of this Section shall not apply to a vendor who sells, exchanges, displays or offers for sale or exchange new or secondhand goods at a swap meet, as defined in Section 103.311 of this Code. This exemption applies only to that portion of a vendor's receipts derived from sales or exchanges at a swap meet. (Added by Ord. No. 158,621, Eff. 2/20/84.)

SEC.21.189.2. RADIO AND TELEVISION BROADCASTER. (Added by Ord. No. 158,484, Eff. 12/29/83).

(a) For every person engaged in business as a radio broadcaster or television broadcaster the tax shall be $18.75 per year or fractional part thereof for the first $15,000.00 or less of gross receipts, plus $1.25 per year for each additional $1,000.00 of gross receipts or fractional part thereof in excess of $15,000.00.

(b) For the purpose of this section, the following terms shall be defined as follows:

1. "Radio Broadcaster" shall mean any person engaging in the business of producing and broadcasting or broadcasting local or network radio programs or advertising material, including but not limited to the furnishing of services, program elements or facilities in connection with such production and broadcasting or broadcasting.

2. "Television Broadcaster" shall mean any person engaging in the business of producing and broadcasting or broadcasting local or network television programs or advertising material, including but not limited to the furnishing of services, program elements or facilities in connection with such production and broadcasting or broadcasting. A "television broadcaster" shall include any

person operating a television system where the viewing audience pays a fee to view the broadcast.

(c) When gross receipts are constitutionally required to be apportioned and are derived from or attributable to activities engaged in within and without the City, gross receipts shall be apportioned in a manner that is fairly calculated to determine the amount of gross receipts derived from or attributable to engaging in business in the City. Such apportionment shall be made on the basis of payroll, values and situs of tangible property, general expense, or by reference to any of these or other factors, or by any other method of apportionment as will fairly determine the amount of gross receipts derived from or attributable to engaging in business in the City. Gross receipts derived from or attributable to sources within the City shall include gross receipts from any activities carried on in this City.

(d) Notwithstanding the foregoing, the gross receipts used in the measurement of the tax under this section shall be limited to receipts which are generated, produced, or attributable to local activities, in the State of California.

(e) The provisions of this section shall apply only to business tax periods commencing on or after January 1, 1984.

SEC.21.190. INDEPENDENT CONTRACTORS:

(a) For every person engaged in any trade, calling, occupation, vocation, profession or other means of livelihood, as an independent contractor and not as an employee of another, and not specifically taxed by other provisions of this Article, the tax shall be $30.00 per year or fractional part thereof for the first $6,000.00 or less of gross receipts, plus $5.00 per year for each additional $1,000.00 of gross receipts or fractional part thereof in excess of $6,000.00. (Amended by Ord. 140,706, Eff. 9/11/70, Operative 1/1/71.)

(b) A person engaged in more than one trade, calling, occupation, vocation, profession or other means of livelihood embraced within this section shall consolidate all gross receipts and shall be issued one registration certificate covering all such activities. Any person engaged in any activities embraced within this section, in addition to activities covered by any other section of this Article, shall obtain separate registration certificates for the activities covered by such other sections.

(c) As used in this section, the term "gross receipts" does not include:

1. Receipts from a trade, calling, occupation, vocation, profession or other means of livelihood, which this city is prohibited from taxing under the Constitution or laws of the United States, or under the Constitution or laws of the State of California;

2. Receipts of community chests, funds, foundations or corporations organized and operated for religious, hospital or charitable purposes, not conducted for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual;

3. Receipts of non-profit educational institutions of collegiate grade, defined herein to mean institutions incorporated as colleges or seminaries under the laws of the State of California, which require for regular admission the completion of a four-year high school course, or its equivalent, and which confer upon their graduates at least one academic or professional degree, based on a course of at least four years in liberal arts and sciences, or on a course of at least three years in professional studies such as law, theology, education, medicine, pharmacy, architecture, fine arts, commerce, or journalism; receipts of non-

profit secondary schools which are duly accredited by the University of California; and receipts of non-profit elementary schools in which instruction is given to students in the pre-primary and primary grades in the several branches of studies required to be taught in the public schools of the State of California;

4. Receipts of Rotary, Kiwanis and Lions Clubs, non-profit automobile clubs, Chambers of Commerce, and other community service organizations; also receipts of trade associations such as Merchants Plumbers Association, Merchants and Manufacturers Association and labor organizations;

5. Receipts of (a) railroad companies including street railways, herein defined to include interurban electric railway, (b) sleeping car, dining car, drawing-room car, and palace car companies, refrigerator, oil, stock, fruit and other car-loaning and other car companies operating upon railroads in this city, (c) companies doing express business on any railroad, steamboat, vessel or stage in this city, (d) telegraph and telephone companies, (3) companies engaged in the transmission or sale of gas electricity;

6. (Amended by Ord. No. 149,503, Eff. 5/26/77.) Receipts of persons acting as agents or brokers for other persons to be paid over to such other persons, or to pay for such other persons' legal obligations, or as reimbursements for sums advanced by the agent for such other persons' legal obligations, or to be invested on behalf of such other persons. Notwithstanding the foregoing, however, the term "gross receipts" includes but is not limited to:

(i) receipts of any person received as commissions or fees earned, or charges of any character made of compensation of any character received, for the performance of any service by said person or any of said person's employees:

(ii) Receipts of any person received as partial or full compensation or reimbursement for salaries, payroll taxes, fringe benefits and any and all similar expenses for persons who are employees of said person under the criteria set forth in Division 4, Part 1, Chapter 2, Article 2 of the Labor Code of the State of California as effective on July 1, 1976. (Amended by Ord. No. 149,975, Eff. 9/12/77.)

(iii) receipts of any person received as partial or full compensation or reimbursement for equipment, supplies, utilities, or other items or services acquired by said person in that person's name and used or consumed in the performance of services subject to tax under this Section.

Provided, further, that any agent or broker dealing in stocks or other similar written instruments evidencing the right to participate in the assets of any business, or dealing in bonds or other evidences of indebtedness, who also deals in such property as a principal, shall include the gross receipts by which the tax is measured the amount of his trading profits resulting from such dealings. No deduction from receipts attributable to trading as a principal shall be made unless such deduction is provided for under subsection (a) of Section 21.00 this Article.

7. Receipts from the publication and sale of newspapers, magazines and other periodicals regularly issued at average intervals not exceeding three months. The exclusion contained in this subdivision shall not apply only to business tax periods commencing on or after January 1, 1984. (Amended by Ord. No. 158,484 Eff. 12/29/83.)

8. Receipts derived by a radio or television studio, station or network business from the production or broadcasting of local or network radio or television programs or advertising materials, including but not limited to the furnishing of services, program elements or facilities in connection with such production or broadcasting; provided. However, that nothing in this subdivision shall exempt any person from the tax imposed under Section 21.109 or exclude from the measure of the tax any receipts derived by any person from the operation of a television system where the viewing audience pays a fee to view the broadcast; provided, further, that nothing in this subdivision shall be construed as entitling any studio, station or network business to engage in a business subject to tax under Sections 21.166, 21.167 or 21.192 without paying the tax required thereunder. The exclusion contained in this subdivision shall not apply only to business tax periods commencing on or after January 1, 1984. (Amended by Ord. No. 158,484, Eff. 12/29/83.)

(c) 89. Receipts of a person acting as a real estate salesman as that term is defined in Section 10132 of the California Business and Professions Code. (Added by Ord. No. 152,091, Eff. 4/23/79.)

(d) When the gross receipts are derived from or attributable to activities engaged in within and without the City, gross receipts shall be allocated

in such a manner as is fairly calculated to determine the amount of gross receipts derived from or attributable to engaging in business in the City. Such allocation shall be made on the basis of payroll, value and situs of tangible property, general expense, or by reference to any of these or other factors, or by such other method of allocation as will fairly determine the amount of gross receipts derived from or attributable to engaging in business in the City. Gross receipts derived from isolated or occasional transactions at places outside the City but within the State of California, where the registrant is not regularly engaged in a course of business transactions shall be deemed to be gross receipts derived from engaging in business in the City. Gross receipts derived from or attributable to sources within this city include (a) gross receipts from tangible or intangible property located or having situs in this city and (b), when not contrary to law, gross receipts from any activities carried on in this city regardless of whether carried on in interstate, intrastate or foreign commerce.

Allocation formulae designed to carry into effect the purpose of this subsection shall be adopted by the City Clerk by rules and regulations. The City Clerk is hereby authorized, in the application to individual cases of such rules and regulations and the formulae therein contained, to make such modifications in formulae as may be necessary to carry out the intent of this subsection.

If the City Clerk reallocates gross receipts upon his examination of any return, he shall, upon the written request of the registrant, disclose to him the basis upon with the reallocation has been made.

SEC.21.192. PERSONAL PROPERTY RENTAL: (Amended by Ord. No. 140,833, Eff. 9/29/70, Operative 1/1/71.)

For every person engaged in the business of leasing or renting any tangible personal property, and not specifically taxed by other provisions of this Article, the tax shall be $30.00 per year or fractional part thereof for the first $12,000.00 or less of gross receipts, plus $2.50 per year for each additional $1,000.00 of gross receipts or fractional part thereof in excess of $12,000.00.

For the purpose of this section, "Tangible Personal Property" shall mean personal property which may be seen, weighed, measured, felt, or touched, or which is in any other manner perceptible to the senses.

SEC.21.197. TELEPHONE COMPANIES: (Added by Ord. No. 127,688, Eff. 7/20/64.)

(a) For every person engaged in the business of providing telephone services, the tax shall be $20.00 per year or fractional part thereof for the first $20,000.00 or less of gross receipts, plus $1.00 per year for each additional 1,000.00 of gross receipts or fractional part thereof in excess of $20,000.00. (Amended by Ord. No. 140,833, Operative 1/1/71.)

(b) For the purpose of this Section, "gross receipts" shall have the same meaning as in subsection (a) of Section 21.00, except that only those receipts derived from providing telephone services within the City of Los Angeles shall be included, and further excepting that only receipts resulting from intra-state telephone services shall be included. "Gross receipts" shall also include receipts from the selling of advertising or advertising space in any directory, other printed matter or any other media only for business tax purposes commencing on or after January 1, 1984. (Amended by Ord. No. 158,484, Eff. 12/29/83.)

(c) For the purpose of this section, a "person engaged in the business of providing telephone services" shall mean a "telephone company" as the term is used in Article XIII, Section 14 of the Constitution of California.

Supreme Court, U.S.
FILED
DEC 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-919

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

THE TIMES MIRROR COMPANY,
TRIBUNE NEWSPAPERS WEST, INC.,
AND LOZANO ENTERPRISES,
Appellants,
VS.
THE CITY OF LOS ANGELES,
Appellee.

ON APPEAL FROM THE CALIFORNIA
COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION TWO

MOTION OF APPELLEE CITY OF LOS ANGELES TO DISMISS OR AFFIRM

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No. 87-919

In the Supreme Court

OF THE

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OCTOBER TERM, 1987

THE TIMES MIRROR COMPANY,
TRIBUNE NEWSPAPERS WEST, INC.,
AND LOZANO ENTERPRISES,
Appellants,
VS.
THE CITY OF LOS ANGELES,
Appellee.

ON APPEAL FROM THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION TWO

MOTION OF APPELLEE CITY OF LOS ANGELES TO DISMISS OR AFFIRM

Pursuant to Rule 16.1, the Appellee, City of Los Angeles, a municipal corporation, moves to dismiss the appeal herein or, in the alternative, to affirm the judgment of the California Court of Appeal, Second Appellate District, Division Two. The motion is based on the fact that the judgment below is correct and not in conflict with this Court's decision in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue* [(1983) 460 U.S. 575], nor any decision of a federal or state court. Further, the apportionment formulae of the City of Los Angeles meet all constitutional standards with respect to apportionment of business taxes and there are no inconsistent

or conflicting decisions requiring review by this Court. Based on these grounds it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

INTRODUCTION

The City of Los Angeles (City) is a municipal corporation organized and existing by virture of a charter as authorized by the Constitution of the State of California. The City has a Business Tax Ordinance ("ordinance") which is codified as Article 1 of Chapter II of the Los Angeles Municipal Code and imposes a tax on persons for the privilege of engaging in business or occupations within the City (DeBord Declaration ¶¶ 4 & 5,[1] Appendix A, p. 1). The tax is a self reporting tax and is imposed pursuant to the taxing power of the City solely for the purpose of raising revenue (DeBord Declaration ¶¶ 5 & 6, Appendix A, pp. 1-2).

Every person engaged in business or an occupation within the City must obtain a Business Tax Registration Certificate which is the means whereby a taxpayer registers with the City Clerk for the purpose of paying business taxes and results in an account number being given to the taxpayer (DeBord Declaration ¶ 5, Appendix A, p. 1). The Office of the City Clerk does not have the authority to refuse to issue a Business Tax Registration Certificate (DeBord Declaration ¶ 7, Appendix A, p. 2).

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[1]Attached as Appendix A is the Declaration of Donald J. DeBord, Chief of the Tax and Permit Division of the City Clerk's Office dated January 29, 1986. Attached as Appendix B is his Declaration dated November 22, 1985. These Declarations were not controverted at trial and appear at pages 727-733 and 421-428, respectively, of the Joint Appendix filed with the California Court of Appeal.

For the year 1984 there were a total of 273,125 accounts subject to the ordinance which generated $131,038,243 in revenues (DeBord Declaration ¶ 6, Appendix B, pp. 1-2). For the tax year 1985 there were a total of 250,653 accounts subject to the ordinance, which generated $141,605,793 in revenues for the City (DeBord Declaration ¶ 7, Appendix B, p. 2).

There is within the ordinance, section 21.166[2] which is a generic classification of business activity generally referred to as "wholesale sales." "Every person manufacturing and selling any goods, wares or merchandise at wholesale or selling any goods, wares or merchandise at wholesale" is subject to a tax measured by gross receipts. The tax is $20.00 per year or fractional part thereof for the first $20,000, plus $1.00 per year for each additional $1,000.00 of gross receipts or fractional part thereof in excess of $20,000.00. This tax rate has been in effect since January l, 1971 (DeBord Declaration ¶ 10, Appendix A, pp. 2-3). For the tax year 1984, there were 28,530 accounts within this classification, generating $19,475,181 in revenues (DeBord Declaration ¶ 8d, Appendix B, p. 3). For the tax year 1985 there were 24,931 accounts, generating $17,610,797 in revenues (DeBord Declaration ¶ 8e, Appendix B, p. 3).

Section 21.167 is a generic classification of business activity generally referred to as "retail sales." "Every person manufacturing and selling any goods, wares or merchandise at retail or selling any goods, wares or merchandise at retail" is subject to a tax measured by

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[2]Unless otherwise specified, "section" refers to a section of the Los Angeles Municipal Code. The full text of sections 21.15(h), 21.109, 21.147, 21.166, 21.167, 21.189.2, 21.190 and 21.192, discussed herein, appear in Appendix E, pp. 31a-49a, of the Jurisdictional Statement filed by Appellants and will not be republished in full here.

gross receipts. The tax is $18.75 per year or fractional part thereof for the first $15,000, plus $1.25 per year for each additional gross receipts. This tax rate has been in effect since January 1, 1971, (DeBord Declaration ¶ 11, Appendix A, p. 3). For the tax year 1984 there were 75,975 accounts in this classification which generated $26,205,333 in revenues (DeBord Declaration ¶ 8d, Appendix B, p. 3). For the year 1985 there were 68,268 accounts in this classification, generating $25,394,465 in tax revenues (DeBord Declaration ¶ 8e, Appendix B, p. 3).

The ordinance classifies various other business activities under other generic classifications. For example, section 21.190 classifies all persons who engage in any trade, calling, occupation, profession or other means of livelihood as an independent contractor, *not otherwise specifically taxed* by other provisions of the ordinance. The tax rate is $30.00 per year for the first $6,000 of gross receipts plus $5.00 for each additional $1,000 of gross receipts. This rate has been in effect since January 1, 1971 (DeBord Declaration ¶¶ 8e, 9c & 9d, Appendix B, pp. 3-4). For the tax year 1984 there were 76,191 accounts in this classification, resulting in $63,458,753 in revenues and for the tax year 1985 this classification contained 75,074 accounts, resulting in $69,228,210 in revenues (DeBord Declaration ¶¶ 8d & 8e, Appendix B, p. 3).

Section 21.192 is a classification for the rental of tangible personal property which is any personal property that "may be seen, weighed, measured, felt, or touched, or which is in any manner perceptible to the senses." The measure of tax is the taxpayers gross receipts and the tax is $30.00 for the first $12,000 of gross receipts plus $2.50 for each $1,000 of gross receipts in excess of $12,000 (DeBord Declaration ¶ 18, Appendix A, p. 5).

Theaters, including theaters which exhibit motion pictures, are classified by section 21.147. The measure of tax under this section is based upon gross receipts and the tax is calculated at the same rate and in the same manner as for section 21.167, retail sales (See pp. 3-4, *supra*) (DeBord Declaration ¶ 17, Appendix A, p. 5).

The ordinance, by section 21.109, classifies and taxes motion picture and cartoon production. The measure of this tax is based upon the total of the gross costs of production, gross receipts for the lending of employees and gross receipts received from the furnishing of motion picture studio facilities. The tax is graduated and where the measure of the tax is $4,200,000 or more, the tax does not exceed $10,750 (DeBord Declaration ¶ 16, Appendix A, pp. 4-5).

Prior to January 1, 1984, receipts derived from the publication and sale of newspapers, magazines and other periodicals regularly issued at average intervals not exceeding three (3) months, and radio and television broadcasting, were excluded from taxation pursuant to sections 21.190(c)(7) and 21.190(c)(8). At all times prior to January 1, 1984, businesses engaged in the publishing and printing of books and other non-exempt printed material were subject to taxation and classified under sections 21.166 and 21.167 (DeBord Declaration ¶ 9, Appendix A, p. 2).

Effective January 1, 1984 these exemptions were eliminated and receipts from the publication and sale of newspapers, among others, were classified for City business tax purposes by adding Sections 21.166(f) and 21.167(d) and radio and television broadcasting was classified by adding section 21.189.2. Section 21.109 (Motion Picture and Cartoon Producer) was amended by adding subdivision (d) to prevent double taxation of

television producers by exempting them from section 21.109 if otherwise subject to Section 21.189.2. The tax rate for broadcasters is the same as for retail sales, section 21.167 (See pp. 3-4, *supra*) (DeBord Declaration ¶¶ 11 & 12, Appendix B, p. 4).

The term "goods, wares or merchandise" as used in sections 21.166 and 21.167 was amended to include "newspapers, magazines, periodicals, books and other printed matter". The term "manufacturing" as used in those sections was amended to include "publishing or publishing and printing." All persons in the business of publishing or publishing and printing of newspapers, magazines, periodicals, books and other printed material are treated identically for City tax purposes, not only with each other, but with all other retail and wholesale businesses (DeBord Declaration ¶ 13, Appendix A, pp. 3-4).

The City Clerk is authorized by section § 21.15(h) to adopt rules and regulations to insure a fair apportionment of taxes. The City Clerk has promulgated Tax Ruling Nos. 13 and 14[3] for the apportionment of gross receipts of taxpayers subject to sections 21.166 and 21.167. Each was adopted on June 30, 1972 and each is applicable to all businesses classified as either a wholesaler or retailer, now including those engaged in the business of publishing or publishing and printing, such as Appellants (DeBord Declaration ¶ 19, Appendix A, p. 5). Each provides for an apportionment formula based upon specified physical elements and further provides that any person who believes that the percentages do not apply to the facts of the taxpayer's particular business may peti-

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[3]City Clerk's Tax Rulings 13 and 14 are set forth in full in Appendices C and D respectively.

tion the City Clerk, in writing, for a modification of the formula. The taxpayer has the burden of establishing the modification.

ARGUMENT

1. THE JUDGMENT BELOW WAS CORRECT IN HOLDING THAT THE LOS ANGELES CITY BUSINESS TAX IS CONSTITUTIONAL UNDER THE GUIDELINES ENUNCIATED BY THIS COURT IN MINNEAPOLIS STAR.

Appellants' argument that the Los Angeles City Business Tax is an unconstitutionally discriminatory tax in violation of this Court's holding in *Minneapolis Star and Tribune v. Minnesota Commissioner of Revenue* [(1983) 460 U.S. 575], was properly rejected below for two cogent reasons:

1. It depended upon a factual presentation which cast the structure of the City tax ordinance in a false light; and

2. It required that *Minneapolis Star* be extended to require a unitary tax for all First Amendment business enterprises.

The attempt to place the City tax structure in a false light is clearly shown by reference to the chart at page 7 of the Jurisdictional Statement. At first reading it appears that the ordinance is designed to classify and tax only those businesses which are unquestionably protected by the First Amendment to the exclusion of other businesses. However, even a cursury review of the text of those ordinances as set forth in Appendix H of the Jurisdictional Statement (pp. 33a-50a) and the Declarations of Donald J. DeBord attached hereto as Appendices C and D, shows the misleading nature of the chart. The

record unequivocally proves that the City business tax is a broad based general business tax which applies to all businesses. Business enterprises are classified by generic classifications, not by specific business activities. Thus Appellants, as newspaper publishers, are classified as manufacturers and sellers or sellers at wholesale or retail, classifications which account for over 33% of all tax accounts subject to the City tax (DeBord Declaration 15, Appendix A, p. 4).

The holding in *Minneapolis Star* was limited to a tax which singled out the press for a special or unique tax and then targeted a small group of newspapers to bear the full burden of the tax (at 591-592). This Court, in very specific language, stated that broad based economic regulation, such as the City business tax, does not create constitutional problems (at 581) and rejected the concept put forth by the Appellant in that case that a generally applicable tax on the press is unconstitutional (at 586, n.9).

Recognizing that the constitutional concerns expressed by this Court have been addressed in the manner approved by this Court, Appellants reason that the constitutional infirmity with the City's tax ordinance is not that it does not apply equally to the "press" or "newspapers" (let alone all publishers) but that it does not apply equally to all business activities protected by the First Amendment, that is, *Minneapolis Star* does not mean what it clearly says.

Minneapolis Star held only that the tax had to be one of "general applicability" and not single out the First Amendment activity encompassed by the tax. The opinion contains no language (nor does any subsequent opinion) to support Appellants' radical conclusion that, assuming a general tax, the ordinance must provide the same tax

rate for all First Amendment activities or alternatively, require that it assure tax parity between First Amendment and non-First Amendment businesses. An equally absurd result would obtain if the Appellants are returned to the tax exempt status they enjoyed prior to January 1, 1984. Their reasoning dictates that if one First Amendment business activity is exempt, then all must be. Such reasoning is inconsistent with this Court's long established precedent with respect to the ability of a legislature to create reasonably based tax classifications [See *e.g., Carmichael v. Southern Coal & Coke Co.* (1936) 301 U.S. 495], let alone *Minneapolis Star.*

In order to bolster their argument, Appellants loudly complain that they pay more in taxes than a movie producer given the same gross receipts (Jurisdictional Statement, p. 8). However, the trial record is devoid of any evidence to show that any one producer's cost of production is equal to the gross receipts of Appellants. Appellants assume, without evidence, that there is a producer who is willing (and able) to spend $100 million in production costs in the City of Los Angeles. The Court of Appeal correctly observed that the movie industry is a fragmented one and that the City taxes all the fragments. That, along with the fact that there was no showing that a movie producer operated in a similar manner to newspaper publishers or any other manufacturer, retailer or wholesales, precluded a constitutional violation (Jurisdictional Statement, pp. 17a-18a).

It is also important to emphasize what Appellants *do not* complain about. There is no complaint that they pay more in taxes than others similarly classified as manufacturers and sellers or sellers with the same gross receipts. Clearly, if the City tax structure treated similarly situated taxpayers differently, and that difference was based

upon the exercise of protected First Amendment activities, there would be much to be concerned about. Appellants' problem is that all similarly situated businesses are treated identically for tax purposes without reference to the First Amendment, resulting in no substantial federal question before this Court.

The evidence before this Court is uncontroverted. There is no discrimination; there is no special or unique tax. There is neither content review, nor a censorial threat repugnant to the First Amendment. Appellants want this Court to promote their self-created artificial distinctions and radical legal theory to the equivalent of a constitutional violation. It is clear that their reliance on *Minneapolis Star* is misplaced based upon the plain language of that opinion. Since this Court declined to consider whether a distinction between different types of periodicals (by exempting newspapers and not magazines from the state sales tax) presented a basis for invalidating a tax as it was applied to the press in *Arkansas Writers' Project, Inc. v. Ragland* [No. 85-1370 (Apr. 22, 1987) 95 L.Ed. 2d 209, 215], Appellants have no legal support for their extreme position that *Minneapolis Star* requires *all* First Amendment businesses be treated the same.

2. REVIEW IS NOT NECESSARY TO SECURE UNIFORMITY OF DECISION.

Contrary to the impression given this Court by the Appellants in their Jurisdictional Statement (pp. 16-20), the opinion of the Court of Appeal is not in conflict with any decision of this Court or any other Court.

Unlike the facts in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue* [(1983) 460 U.S. 575], the Los Angeles City business tax does not "impose a special tax on the press and, by enacting exemptions, to

limit its effect to only a few newspapers" (at 576). The uncontroverted facts show that this tax is a general business tax applicable to all businesses, including manufacturers and sellers at wholesale and retail. The publishers of "newspapers, magazines, periodicals, books and other printed matter" are all subject to the tax without exception or exemption and treated similarly to all non-publisher manufacturing and mercantile businesses.

Unlike the facts in *Arkansas Writers' Project, Inc. v. Ragland* [No. 85-1370 (Apr. 22, 1987) 95 L.Ed. 2d 209] no tax status is based upon content (at 223). Further, with respect to the reserved issue therein, whether a distinction between different types of periodicals would invalidate a tax, the City's business tax treats all publishers of newspapers, magazines, periodicals, and other printed material the same. Thus even should this Court in the future require such identical treatment, the City's business tax will still pass "constitutional muster".

Unlike the facts in *Louisiana Life, Ltd. v. McNamara* [504 So. 2d 900 (La.App. 1 Cir., 1987)], the Los Angeles City business tax does not "exempt some publications but not all publications" (at 902) and therefore, it is not unconstitutional because it applies only to the manufacture and sale of magazines and not newspapers (at 905). The "equality of status" required by the Louisiana Court (at 905) is realized in the City's ordinance when, in removing the exemption from taxation for newspapers, magazines and other periodicals, it subjected all newspapers, magazines and periodicals to the same tax classification and same tax rate long imposed on the publishers of books and other printed material. Indeed, the "equality of status" requirement imposed by the Louisiana Court would be fruitful grounds to argue that the previous exemption for "newspapers, magazines and other periodi-

cals regularly published at average intervals not exceeding three months" was unconstitutional because there is no qualitative difference under the First Amendment for words printed at intervals of less than 3 months and books or semi-annual or annual periodicals.

Unlike the facts in *Thomson Newspapers, Inc. v. City of Florence* [338 S.E. 2d 324 (S.C. 1985)] newspapers are not separately classified but are classified as a manufacturer for business license tax purposes as the complaining newspaper asserted was constitutionally required (at 325).

Unlike the facts in the case *In Re Advisory Opinion To The Governor* [509 So. 2d 292 (Fla. 1987)], the Los Angeles City business tax does not grant a tax exemption to a few types of motion picture productions (at 309). In fact the City imposes a business tax on all movie production in the City.

Unlike the facts in *City of Alameda v. Premier Communications Network, Inc.* [156 Cal.App.3d 148, 202 Cal.Rptr. 684, cert. denied, 469 U.S. 1073 (1984)], these taxpayers are not being "taxed differently than the great majority of business and in a more burdensome manner" than other businesses (at 155-156). The converse is true here. These plaintiffs are taxed identically with the great majority of businesses and in the same manner.

Unlike the facts in *Festival Enterprises, Inc. v. Pleasant Hill* [(1986) 182 Cal.App.3d 960, 227 Cal.Rptr. 601], these taxpayers are not the only ones expected to bear the entire impact of the tax (at 964). They are treated identically with all other "publishers" as well as every other manufacturer or seller. The tax imposed on these petitioners is not "in addition to" the basic business

license tax (at 964), it is the basic business license tax from which these taxpayers were previously exempt.

Thus, even assuming for the sake of argument, that there is conflict between these cases as Appellants insist, there is no conflict between them and the opinion of the Court of Appeal. As to the specific constitutional concerns raised in each case, Appellee's tax is imposed in a constitutionally approved manner. Whatever conflicts or inconsistencies may exist between various Courts, there are no issues presented here which would allow this Court to resolve them.

It is equally important to point out that the Court of Appeal opinion is not only not inconsistent with the above cited cases, but also that it is entirely consistent in reasoning and result with established precedent with respect to general taxation of newspapers. See *Girage v. Moore* (1937) 64 P.2d 819, appeal dismissed for want of a substantial federal question, 301 U.S. 670 (1937); *Arizona Publishing Co. v. O'Neil* (1938) 22 F. Supp. 117, judgment affirmed, 304 U.S. 543 (1938); *Tampa Times Co. v. City of Tampa* (1947) 29 So. 2d 368, appeal dismissed for want of a substantial federal question, 332 U.S. 749 (1947).

3. THE COURT OF APPEAL WAS CORRECT IN REJECTING APPELLANTS' CONTENTION THAT THE CITY BUSINESS TAX IS UNCONSTITUTIONAL BECAUSE IT GRANTS THE CITY CLERK "STANDARDLESS DISCRETION" TO ADOPT RULES TO APPORTION TAXES.

The term "standardless discretion" has no meaning with respect to the concept of apportionment of taxes. As the Jurisdictional Statement correctly notes (pp. 2-3), standardless discretion is a concept used in the context of a state's regulatory authority (*i.e.*, the issuance of a

discretionary permit), not its taxing power. Appellants are unable to cite to this Court a case from any court which uses that term or concept with respect to apportionment.

Essentially, their argument requires this Court to overrule long established precedent. This is best illustrated by reference to *Butler Brothers v. McColgan* [(1941) 315 U.S. 501] which held that the concept of apportionment is a "method of allocation which is fairly calculated to assign . . . that portion of the net income 'reasonably attributable' to the business done there" (at 506). This Court placed the burden on the party attacking the apportionment formula to show by clear and cogent evidence that the formula resulted in extraterritorial values being taxed (at 507). Indeed, Justice Douglas commented that this should come as no surprise because it was "settled doctrine" (at 510).

As the Court of Appeal correctly reasoned (Jurisdictional Statement, p. 23a), the rule requested by Appellants would result in a shift of the burden of proof from the taxpayer to prove unfair taxes to the City Clerk to justify the formula under the compelling state interest test. Appellants' sole authority for this shift is *Big Mama Rag v. United States,* 631 F.2d 1030 (D.C. Cir. 1980), which is simply not even close to being on point as Appellants assert (Jurisdictional Statement, p. 19). The Court below correctly limited the holding of *Big Mama Rag* (Jurisdictional Statement, pp. 23a-24a) to the denial of a tax exemption based solely upon the content of protected speech. Indeed, *Big Mama Rag* does not even apply where the criteria used to deny a tax exemption is content neutral. See *National Alliance v. United States,* 710 F.2d 868 (D.C. Cir, 1983).

With this in mind, two obvious but important facts about City Clerk's Tax Rulings 13 and 14 (Appendices C and D) must be emphasized:

1. They are content neutral, hence *Big Mama Rag* does not apply if one assumes they are tax exemptions.

2. They were not promulgated to grant an exemption from taxation but to determine the fair amount of taxes reasonably attributable to in-city business activity. Since their purpose is not to subsidize a constitutional right, let alone subsidize one First Amendment activity at the expense of another, strict scrutiny does not apply. See *Regan v. Taxation with Representation* (1983) 461 U.S. 540.

There is no conflict or inconsistency between the Court of Appeal decision, the tax rulings and any federal court decision with respect to apportionment. The reasoning and holding of the Court below is consistent with established precedent, and since there is no authority to the contrary, there is no issue for this Court to review and the appeal should be dismissed or the judgment affirmed.

CONCLUSION

There are no substantial constitutional questions presented in this matter. The Court of Appeal opinion is neither contrary to established precedent nor in conflict with authority from any jurisdiction and the appeal should be dismissed or the judgment affirmed.

Respectfully submitted,

JAMES K. HAHN, City Attorney
PEDRO B. ECHEVERRIA,
Assistant City Attorney
RICHARD A. DAWSON,
Assistant City Attorney
MICHAEL L. KLEKNER,
Deputy City Attorney and
Counsel of Record

Attorneys for Appellee
The City of Los Angeles

APPENDIX A

DECLARATION OF DONALD J. DeBORD

I, DONALD J. DeBORD declare as follows:

1. I have been employed in the Tax and Permit Division, Office of the City Clerk of the City of Los Angeles for the past 24 years. I am the Chief of said Division.

2. I am required to know, and do in fact know the provisions of Chapter II of the Los Angeles Municipal Code, and the rules and regulations adopted pursuant thereto by the City Clerk of the City of Los Angeles.

3. My responsibilities includes the supervision and control over the employees of and the record-keeping procedures used by the Tax and Permit Division. I am required to know and in fact do know the duties of the employees I supervise and the methods used in maintaining the records which I supervise.

4. Chapter II of the Los Angeles Municipal Code (hereinafter L.A.M.C.), generally governs licenses, permits and taxes within the City of Los Angeles (hereinafter 'City'). Article 1 of Chapter II of the L.A.M.C. specifically establishes the Business Tax Ordinance.

5. The Business Tax Ordinance is a tax imposed upon persons for the privilege of engaging in businesses or occupations within the City [attached hereto as Exhibit A is a true, full and correct copy of L.A.M.C.: § 21.00(b)]. It is a self reporting tax [Attached hereto as Exhibit B is a true, full and correct copy of L.A.M.C. § 21.14(a)1], and imposed pursuant to the taxing power of the City solely for the purpose of raising revenue [attached hereto as Exhibit C is a true, full and correct copy of L.A.M.C. § 21.03(b)].

6. Every person engaged in specified businesses or occupations within the City must obtain a Business Tax Registration Certificate (hereinafter BTRC) [attached hereto as Exhibit D is a true, full and correct copy of L.A.M.C. § 21.03(a)] which is the means whereby and taxpayer registers with the City Clerk for the purposes of paying business taxes. [Attached hereto as Exhibit E is a true, full and correct copy of L.A.M.C. § 21.08]. As a result of obtaining a BTRC, an account number is given the taxpayer.

7. The Office of the City Clerk of the City of Los Angeles does not have the authority to refuse to issue a BTRC.

8. The Times-Mirror Company, Tribune Newspapers West, Inc., and Lozano Enterprises each hold valid BTRC's.

9. Prior to January 1, 1984, receipts derived from the publication and sale of newspapers, magazines and other periodicals regularly issued at average intervals not exceeding three (3) months, and radio and television broadcasting were excluded from taxation pursuant to Sections 21.190(c)(7) and 21.190(c)(8) (Attached hereto as Exhibit F is a true, full and correct copy of L.A.M.C. § 21.190 as it existed on December 31, 1983). At all times prior to January 1, 1984, businesses engaged in publishing and printing of books and other non-exempt printed material were subject to the City Business Tax Ordinance, classified under L.A.M.C. Sections 21.166 and 21.167.

10. L.A.M.C. Section 21.166 is a general classification of business activity generally referred to as "wholesale sales". "Every person manufacturing and selling any goods, wares or merchandise at wholesale or selling any

goods, wares or merchandise at wholesale" is subject to a tax measured by gross receipts. The tax is $20.00 per year or fractional part thereof for the first $20,000 or less of gross receipts, plus $1.00 per year for each additional $1000.00 of gross receipts or fractional part thereof in excess of $20,000.00. This tax rate has been in effect since January 1, 1971.

11. L.A.M.C. Section 21.167 is a general classification of business activity generally referred to as "retail sales". "Every person manufacturing and selling any goods, wares or merchandise at retail or selling any goods, wares or merchandise at retail" is subject to a tax measured by gross receipts. The tax is $18.75 per year or fractional part thereof for the first $15,000 or less of gross receipts, plus $1.25 per year for each additional $1000.00 of gross receipts or fractional part thereof in excess of $15,000.00. This tax rate has been in effect since January 1, 1971.

12. Effective January 1, 1984 the exemptions noted in paragraph 9 were eliminated and publishing businesses were classified as the manufacturing and selling or selling of any goods, wares or merchandise at either wholesale or retail, and taxed by the addition of subsections (f) and (e) to Sections 21.166 and 21.167, respectively, [Attached hereto as Exhibits G and H, respectively, are true, full and correct copies of Sections 21.166 and 21.167 as they existed on January 1, 1984]. Radio and television broadcasting was classified by the addition of Section 21.189.2 to the L.A.M.C. (attached hereto as Exhibit I is a true full and correct copy of Section 21.189.2) but taxed at the same rate as provided in Section 21.167, retail sales, as described in paragraph 11, above.

13. For purposes of the Business Tax Ordinance, "newspapers, magazines, periodicals, books and other printed matter" are included within the term "goods,

wares or merchandise" as used in Sections 21.166 and 21.167; and "publishing or publishing and printing" are included within the term "manufacturing" as used in Sections 21.166 and 21.167. All persons in the business of publishing or publishing and printing of newspapers, magazines, periodicals, books and other printed material are treated identically for City tax purposes, not only with each other, but with all other retail and wholesale businesses.

14. In addition to gross receipts from the manufacturing or sale of goods, wares or merchandise, gross receipts from advertising revenues which would otherwise be subject to the tax rate of L.A.M.C. § 21.190 were included within the definition of "gross receipts" in Sections 21.166(f) and 21.167(e), thus minimizing the tax burden on those engaged in the business of publishing or publishing and printing. Otherwise, publishing enterprises are given identical treatment with all other businesses classified by Sections 21.166 and 21.167.

15. Sections 21.166 and 21.167 are general or generic business classifications for all wholesale and retail businesses. For the tax year 1984 these classifications represented 38% of the accounts under the Business Tax Ordinance (104,505 of 273,125 accounts). For the tax year 1985 these classifications represented 35% of the accounts subject to the Business Tax Ordinance (93,199 of 250,653 accounts).

16. The Business Tax Ordinance classifies various business activities and imposes a business tax measured by gross receipts under some circumstances and alternate measures under other circumstances. One such classification is "Motion Picture Producer" which is classified by L.A.M.C. § 21.109 (attached hereto as Exhibit J, is a true, full and correct copy of Section 21.109). The measure of

this tax is based upon the total of the gross costs of production, gross receipts for the lending of employees and the gross receipts received from furnishing of motion picture studio facilities. The tax is graduated and where the measure of the tax is $4,200,000 or more, the tax does not exceed $10,750.00.

17. Theaters, including theaters which exhibit motion pictures, are classified by L.A.M.C. Section 21.147 (attached hereto as Exhibit K is a true, full and correct copy of § 21.147). The measure of tax under this section is based upon gross receipts and the tax is calculated at the same rate as in § 21.167, retail sales, as described in paragraph 11 above.

18. The rental of movies is placed in the general or generic business classification of one engaged in the rental of tangible personal property pursuant to L.A.M.C. Section 21.192 (attached hereto as Exhibit L is a true, full and correct copy of L.A.M.C. § 21.192). The measure of tax is based upon gross receipts and the tax is $30.00 for the first $12,000 of gross receipts plus $2.50 for every $1000 in excess of $12,000.

19. The City Clerk is authorized by L.A.M.C. § 21.15(h) [Attached hereto as Exhibit M is a true, full and correct copy of L.A.M.C. § 21.15(h)] to make rules and regulations to insure a fair apportionment of taxes. The City Clerk has promulgated two tax rulings with regard to L.A.M.C. Sections 21.166 and 21.167, for the apportionment of California gross receipts. City Clerk's Rulings 13 and 14, (Attached hereto as Exhibits N and O respectively, are true, full and correct copies of Rulings 13 and 14). Each was adopted on June 30, 1972 and applicable to all businesses classified as either a wholesaler or retailer, now including those engaged in the business of publishing or publishing and printing.

20. In addition to 21.15(h) (Exhibit M) and Clerk Rulings 13 and 14 (Exhibits N and O, respectively), by the terms of L.A.M.C. §§ 21.166(f) and 21.167(e) (Exhibits G and H, respectively), gross receipts of plaintiffs are limited only to California gross receipts. Further, goods shipped out of state to the purchaser are excluded from gross receipts pursuant to LA.M.C. 21.168.1. (Attached hereto as Exhibit P is a true, full and correct copy of L.A.M.C. § 21.168.1).

21. The Times-Mirror Company, Tribune Newspapers West, Inc., and Lozano Enterprises computed, reported and paid their 1984 and 1985 City Business Taxes as required by LA.M.C. 21.14(a) 1 (Exhibit B), each under protest.

22. All the facts set forth in this Declaration are within my personal knowledge or contained in the official records of the City Clerk of the City of Los Angeles, and, if sworn as a witness, I would testify competently thereto.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: January 29, 1986

Donald J. DeBord
Declarant

APPENDIX B

DECLARATION OF DONALD J. DeBORD

I, DONALD J. DeBORD declare as follows:

1. I have been employed in the Tax and Permit Division Office of the City Clerk of the City of Los Angeles for the past 24 years. I am the Chief of said Division.

2. I am required to know, and do in fact know the provisions of Chapter II of the Los Angeles, Municipal Code, and the rules and regulations adopted pursuant to thereto by the City Clerk of the City of Los Angeles.

3. My responsibilities includes the supervision and control over the employees of and the record-keeping procedures used by the Tax and Permit Division. I am required to know and in fact do know the duties of the employees I supervise and the methods used in maintaining the records which I supervise.

4. Chapter II of the Los Angeles Municipal Code (hereinafter L.A.M.C.), regulates licenses, permits and taxes generally within the City of Los Angeles (hereinafter 'City'). Article 1 of Chapter II of the L.A.M.C. establishes the Business Tax Ordinance.

5. The Business Tax Ordinance is a tax imposed upon persons for the privilege of engaging in business or occupations within the City [attached hereto as Exhibit A is a true, full and correct copy of L.A.M.C. § 21.00(b)]. It is a self reporting tax imposed pursuant to the taxing power of the City solely for the purpose of raising revenue [Attached hereto as Exhibit B is a true, full and correct copy of L.A.M.C. § 21.03(a) and (b)].

6. For the tax year 1984, a total of 273,125 items were processed subject to the Business Tax Ordinance dispursed among various classifications, which resulted in a

total of $131,038,243 in business tax revenues to the City.

7. For the tax year 1985, a total of 250,653 items were processed subject to the Business Tax Ordinance dispursed among various classifications, which resulted in a total of $141,605,793 in business tax revenues to the City.

8. Three classifications account for over 60% of the items processed and the years 1984 and 1985, and 80% of the business tax revenues.

They are:

(a) The manufacturing and selling of any goods, wares or merchandise at wholesale, or the selling of any goods, wares or merchandise at wholesale pursuant to L.A.M.C. § 21.166 (attached hereto as Exhibit C is a true, full and correct copy of L.A.M.C. § 21.166).

(b) The manufacturing and selling of any goods, wares or merchandise at retail, or the selling of any goods, wares, or merchandise at retail purusant to L.A.M.C § 21.167 (Attached hereto as Exhibit D is a true, full and correct copy of L.A.M.C. § 21.167).

(c) Engaging in any trade, calling, occupation, vocation, profession or other means of livelihood, as an independent contractor not otherwise specifically taxed by other provisions of Article 1 of Chapter II of the L.A.M.C. pursuant to L.A.M.C. § 21.190 (Attached hereto as Exhibit E is a true, full and correct copy of L.A.M.C. § 21.190).

(d) For the tax year 1984, these sections produced the following totals:

Section	No. of Items Processed	Tax Revenues
21.166	28,530	$ 19,475,181
21.167	75,975	26,205,333
21.190	76,191	63,458,753
Total	180,696	$109,139,267

(e) For the Tax year 1985 these sections produced the following totals:

Section	No. of Items Processed	Tax Revenues
21.166	24,931	$ 17,610,797
21.167	68,268	25,394,465
21.190	75,074	69,228,210
Total	168,273	$112,233,472

9. The tax rates for L.A.M.C. §§ 21.166, 21.167, and 21.190 are as follows:

(a) L.A.M.C. § 21.166 — $20.00 per year or fractional part thereof on the first $20,000.00 or less of gross receipts, plus $1.00 per year for each additional $1,000.00 of gross receipts or fractional part thereof in excess of $20,000.00. (Exhibit C).

(b) L.A.M.C. § 21.167 — $18.75 per year or fractional part thereof the first $20,000 or for the first $15,000.00 or less of gross receipts, plus $1.25 per year for each additional $1,000.00 of gross receipts or fractional part thereof in excess of $15,000.00. (Exhibit D)

(c) L.A.M.C. § 21.190 — $30.00 per year or fractional part thereof for the first $6,000.00 or less of gross receipts, plus $5.00 per year for each additional

$1,000.00 of gross receipts or fractional part thereof in excess of $6,000.00. (Exhibit E)

(d) Although the current rates became effective January 1, 1971, these sections were contained within the Business Tax Ordinance for the last 24 years to my personal knowledge.

(e) The rates for §§ 21.166 and 21.167 are the lowest rates per $1,000 of gross receipts in Article 1, Chapter II of the L.A.M.C. The rate for § 21.190 is the highest rate per $1,000 of gross receipts.

10. Prior to January 1, 1984, receipts derived from the publication and sale of newspapers and radio and television broadcasting were exempt from taxation pursuant to Sections 21.190(c)(7) and 21.190(c)(8) (Attached hereto as Exhibit F is a true, full and correct copy of L.A.M.C. § 21.190 as it existed on December 31, 1983). Without this exemption, unless specifically taxed by another section, these businesses would have been subject to taxation pursuant to L.A.M.C. § 21.190 (Exhibit F).

11. Effective January 1, 1984 these exclusions were eliminated by Ordinance 158,484 (Attached hereto as Exhibit G is a true, full and correct copy of Ordinance 158,484) and receipts from the publication and sale of newspapers, among others, became subject to City business taxes pursuant to L.A.M.C. Sections 21.166(f) and 21.167(e) (Exhibits C and D, respectively) and radio and television broadcasting became subject to taxation pursuant to L.A.M.C. Section 21.189.2). (Attached hereto as Exhibit H is a true, full and correct copy of L.A.M.C. § 21.189.2). Ordinance 158,484 also amended Section 21.109 (Motion Picture Producer) to add subdivision (d) to prevent double taxation of television producers by exempting them from Section 21.109 if otherwise subject to

Section 21.189.2 [attached hereto as Exhibit I is a true, full and correct copy of L.A.M.C. § 21.109(d)].

12. The tax rate for L.A.M.C. § 21.189.2 (broadcasters) (Exhibit H) is the same as the rate for § 21.167 (retail sales) (Exhibit D).

13. The classification for broadcasting (L.A.M.C. § 21.189.2) (Exhibit H) provided total tax revenues of $187,904 for the tax year 1984 and $197,954 for the tax year 1985 (27 and 35 taxpayers respectively).

14. In addition to gross receipts from the manufacturing and sale or sale of goods, wares or merchandise, gross receipts from advertising revenues which would otherwise be subject to L.A.M.C. § 21.190 (Exhibit E) were included within the definition of "gross receipts" in Sections 21.166 and 21.167 (Exhibits C and D respectively), thus minimizing taxes for newpaper publishers.

15. The City Clerk is authorized by L.A.M.C. § 21.15(h), [Attached hereto as Exhibit J is a true, full and correct copy of L.A.M.C. § 21.15(h)] to make rules and regulations to insure a fair apportionment of taxes. The City Clerk has in fact promulgated two tax rulings with regard to L.A.M.C. Section 21.166 and 21.167, City Clerk's Ruling 13 and 14, (Attached hereto as Exhibits K and L respectively, are true, full and correct copies of Rulings 13 and 14). Each was adopted on June 30, 1972 and each is applicable to these plaintiffs.

16. In addition to 21.15(h) (Exhibit J) and Clerk Rulings 13 and 14 (Exhibits K and L respectively), by the terms of L.A.M.C. §§ 21.166(f) and 21.167(e) (Exhibits C and D, respectively), gross receipts of plaintiffs are limited only to California gross receipts, which includes their advertising revenues in addition to sales revenues. Otherwise, only out of state shipments of sales of goods

would be excluded from gross receipts pursuant to L.A.M.C. § 21.168.1. (Attached hereto as Exhibit M is a true, full and correct copy of L.A.M.C. § 21.168.1)

17. For purposes of tax rulings to apportion taxes for taxpayers subject to L.A.M.C. §§ 21.166 and 21.167 (Exhibits C and D, respectively), L.A.M.C. § 21.190(d) (Exhibit E) has no applicability because by its own terms it excludes taxpayers taxed by other provisions of this code.

18. All the facts set forth in this Declaration are within my personal knowledge or contained in the official records of the City Clerk of the City of Los Angeles, and, if sworn as a witness, I would testify competently thereto.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: November 22, 1985.

DONALD J. DEBORD
Declarant

APPENDIX C

CITY OF LOS ANGELES
OFFICE OF CITY CLERK
TAX AND PERMIT DIVISION

CITY CLERK'S RULING NO. 13 (NEW SERIES): PERSONS SELLING GOODS, WARES AND MERCHANDISE IN LOS ANGELES, WITH NO FIXED PLACE OF BUSINESS IN LOS ANGELES

Reference: Section 21.00(i) Los Angeles Municipal Code "Engaged in Business" Sections 21.166, 21.167 Los Angeles Municipal Code.

In administering and collecting the business tax imposed under the provisions of Sections 21.166 and 21.167 Los Angeles Municipal Code, the City Clerk shall apply the following rule with respect to those persons who do not have a fixed place of business within the City of Los Angeles.

A person who does not own, lease, occupy or otherwise maintain within the City of Los Angeles a place or premises upon which or from which he engaged in business, shall nevertheless be deemed to be engaged in business within the City of Los Angeles when, through the physical presence of himself, his employees, his agents, or his equipment, he carries on activities within the City of Los Angeles which are designed to solicit, promote, stimulate, or otherwise encourage the sale of goods, ware, or merchandise.

The measure of tax for such person shall be:

(a) 35% of those gross receipts from all sales to customers located within the City of Los Angeles, where delivery or shipment is made to points within the City by vehicles operated by the taxpayer.

(b) 30% of those gross receipts from all sales to customers located within the City of Los Angeles where delivery or shipment is made to points within the City by means other than vehicles operated by the taxpayer regardless of the f.o.b. point or other conditions of sale.

(c) 30% of those gross receipts from all sales to customers located within the City of Los Angeles where delivery or shipment is made to points outside the City.

Any person who believes that the percentage specified in the appropriate foregoing paragraph (a), (b) or (c) is greater than the facts justify, may apply to the City Clerk for a modification of the percentage. Such application shall be made in writing to the City Clerk and shall be accompanied by a statement of facts supporting the basis for such modification. The City Clerk shall make his determination on the basis of evidence presented to him, and such other evidence as he may have, may request from the taxpayer, or may discover from other sources. The City Clerk shall increase, reduce, or allow to stand the percentage originally determined, depending on the facts.

Should the City Clerk be of the opinion that the percentage specified in the appropriate foregoing paragraph (a), (b) or (c) is less than the facts justify in any particular case, he shall make such investigation as is necessary to ascertain the facts and revise the percentage, if required.

Any variation from the percentage provided for under this ruling shall be approved in writing by either the Chief or Assistant Chief of the Tax and Permit Division.

I, Rex E. Layton, City Clerk of the City of Los Angeles, pursuant to authority granted me in Section 21.15(h) of the Los Angeles Municipal Code, do hereby adopt and promulgate the foregoing rule and regulation pertaining

to the collection of the Los Angeles Business Tax and the enforcement of the provisions of Article 1, Chapter 2 of the Los Angeles Municipal Code. I further declare that this ruling supercedes and replaced City Clerk's Ruling No. 13 (New Series) as restated and adopted on April 5, 1960.

/s/ REX E. LAYTON
REX E. LAYTON, CITY CLERK

APPROVED:
ROGER ARNEBERGH, CITY ATTORNEY
By /s/ Thomas C. Bonaventura
Date June 30, 1972

APPENDIX D

CITY OF LOS ANGELES
OFFICE OF CITY CLERK
TAX AND PERMIT DIVISION

CITY CLERK'S RULING NO. 14 (NEW SERIES): PERSONS SELLING GOODS, WARES AND MERCHANDISE, WHO HAVE A FIXED PLACE OF BUSINESS IN LOS ANGELES

Reference: Sections 21.166, 21.167 Los Angeles Municipal Code.

A person engaged in a business within the City of Los Angeles, subject to tax under the provision of Section 21.166 and/or 21.167, Los Angeles Municipal Code, who owns, leases, occupies or otherwise maintains within the City a place or premises upon which or from which he engages in such business, shall be subject to tax as provided herein.

MANUFACTURING IN LOS ANGELES

A person who manufactures any goods, wares, or merchandise within the City of Los Angeles shall be deemed to be engaged in business within the meaning of Section 21.166 and/or 21.167, Los Angeles Municipal Code, and the measure of tax shall include the total gross receipts from the sale of goods manufactured in the City. (Manufacturing, as used herein, shall be deemed to include the assembling or processing of the person's own goods.)

If, with respect to the item produced, substantial manufacturing activities occur outside the City, and the person believes that the total selling price of goods manufactured, in part, within the City does not fairly reflect the amount of the manufacturing activity occurring within the City, the taxpayer may make written application to the

City Clerk for approval to use, as the measure of tax, the total cost of the manufacturing activity carried on within the City, or any other appropriate method.

SELLING ACTIVITIES CARRIED ON WITHIN AND WITHOUT THE CITY OF LOS ANGELES

A person who owns, leases, occupies or otherwise maintains within the City a place or premises upon which, or from which he engages in the business of selling goods, wares, and merchandise, not manufactured by the taxpayer in the City and whose gross receipts from such sales are attributable to business activities carried on within the City and activities carried on outside the City, may apportion such gross receipts and include in the measure of tax those gross receipts directly attributable to activities carried on within the City.

In making a calculation of gross receipts to be reported as the measure of tax, the person may deduct from 100% of gross receipts the percentage of gross receipts deemed to be directly attributable to selling activities carried on by such person outside the City of Los Angeles. For the purposes of this calculation, the person may deduct, to the extent appropriate, but in no case in an amount greater than, the following percentages of those sales, or particular categories of sales, on which the corresponding elements of the selling process are performed at a place or location outside the City:

1. Up to 30% for the location where the sale is negotiated or solicited by the taxpayer, through the physical presence of himself, his employees or his agents.

2. Up to 20% for the sales office which serves as the base of operations for sales activities, or if there is no sales office which serves as a base of operations, the

office from which the sales activities are directed or controlled.

3. Up to 10% for the location where orders or contracts are accepted or approved. Such acceptance or approval shall be deemed to take place at the location of the office specified in item 2 above, unless there is clear and conclusive evidence that a binding acceptance or approval occurs elsewhere.

4. Up to 20% for any facility, operated by the taxpayer, where the goods, wares or merchandise are stored immediately prior to shipment or delivery.

5. Up to 5% for the location which gives the order for, or arranges for, the shipment or delivery of articles sold.

6. Up to 5% for the place where billing procedures are performed.

7. Up to 5% for the place where the collecting of receipts is performed.

8. Up to 5% for the place to which merchandise is delivered, by vehicles operated by the taxpayer.

PROVISION FOR MODIFICATION OF APPORTIONMENT FORMULA

Any person who believes that the percentage determined to be allowable as a deduction from gross receipts under the foregoing provisions of this ruling is less than the facts justify, may apply to the City Clerk for a modification of the percentage. Such application shall be made in writing to the City Clerk and shall be accompanied by a statement of facts supporting the basis for such modification. The City Clerk shall make his determination on the basis of evidence presented to him, and such other

evidence as he may have, may request from the taxpayer, or may discover from other sources. The City Clerk shall increase, reduce or allow to stand the percentage originally determined, depending on the facts.

Should the City Clerk be of the opinion that the percentage calculated to be allowable as a deduction from gross receipts under the foregoing provisions of this ruling is greater than the facts justify in any particular case, he shall make such investigation as is necessary to ascertain the facts and revise the percentage, if required.

Any variation from the percentages provided for under this ruling shall be approved in writing by either the Chief or Assistant Chief of the Tax and Permit Division.

I, Rex E. Layton, City Clerk of the City of Los Angeles, pusuant to authority granted me in Section 21.15(h) of the Los Angeles, Municipal Code, do hereby adopt and promulgate the foregoing rule and regulation pertaining to the collection of the Los Angeles Business Tax and the enforcement of the provisions of Article 1, Chapter 2 of the Los Angeles Municipal Code. I further declare that this ruling supercedes and replaces City Clerk's Ruling No. 14 (New Series) as restated and adopted on September 14, 1960.

/s/ Rex E. Layton
REX E. LAYTON, CITY CLERK

APPROVED:
ROGER ARNEBERGH, CITY ATTORNEY
By /s/ Thomas C. Bonaventura
Date June 30, 1972

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On December 18, 1987, I served the within Motion of Appellee City of Los Angeles to Dismiss or Affirm in re: "The Times Mirror Company v. the City of Los Angeles" in the United States Supreme Court, October Term 1987, No. 87-919;

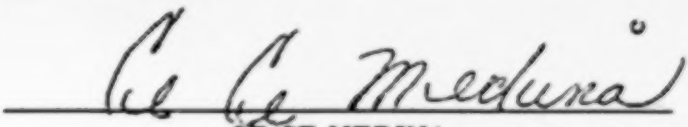
On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Rex S. Heinke
Gibson, Dunn & Crutcher
333 South Grand Avenue
Los Angeles, California 90071
Attorneys for appellants.

All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on December 18, 1987, at Los Angeles, California.



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87-919 (3)

No. 87-

Supreme Court, U.S.
FILED
DEC 1 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE TIMES MIRROR COMPANY,
TRIBUNE NEWSPAPERS WEST, INC.,
and LOZANO ENTERPRISES,

Appellants,

v.

THE CITY OF LOS ANGELES,

Appellee.

On Appeal from the California Court of Appeal, Second Appellate District, Division Two

---

BRIEF OF THE COPLEY PRESS, INC. AND THE NEW YORK TIMES COMPANY AS AMICI CURIAE IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

Of Counsel:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE TIMES MIRROR COMPANY,
TRIBUNE NEWSPAPERS WEST, INC.,
AND LOZANO ENTERPRISES,

Appellants,

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THE CITY OF LOS ANGELES,

Appellee.

On Appeal from the California Court of Appeal, Second Appellate District, Division Two

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BRIEF OF THE COPLEY PRESS, INC. AND THE NEW YORK TIMES COMPANY AS AMICI CURIAE IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

I.

INTERESTS OF AMICI CURIAE

Amici curiae are media organizations with a direct interest in the outcome of this litigation. The Copley Press, Inc. ("Copley") owns and operates several daily newspapers in California, including the *Daily Breeze* in Torrance, the *News-Pilot* in San Pedro, and the *Evening Outlook* in Santa Monica, along with the *San Diego Union* and *The Tribune* in San Diego (the morning and afternoon daily

newspapers of California's second largest city), and seven newspapers in Illinois. Copley also has a direct interest in the outcome of this action because it is presently subject to taxation under the Los Angeles Municipal Code. Copely is the plaintiff in a case pending in the Los Angeles Superior Court which challenges the constitutionality of the same Los Angeles Municipal ordinances at issue in the case at bar, and which raises issues identical to those here, namely, whether differential and discretionary taxation of the media is unconstitutional. (*The Copley Press, Inc. v. City of Los Angeles*, Los Angeles County Superior Court No. C 541713.)

The New York Times Company ("New York Times") is the publisher of *The New York Times*, a national newspaper with a circulation of over one million daily and 1.6 million on Sundays. New York Times also owns and operates 35 smaller regional newspapers, including *The Santa Barbara News Press* in Santa Barbara, California, and *The Press Democrat* in Santa Rosa, California, along with several nationally circulated magazines, five television stations and two radio stations. New York Times has a direct interest in the outcome of this action because it is presently subject to taxation under the Los Angeles Municipal Code. A New York Times subsidiary is the plaintiff in a case pending in Los Angeles County Superior Court which challenges the same Los Angeles municipal ordinance at issue in the case at bar, and which raises issues identical to those here, namely, whether differential and discretionary taxation of the media is unconstitutional. (*New York Times Sales, Inc. et al. v. City of Los Angeles*, Los Angeles County Superior Court No. C 586029.)

In addition, both Copley and New York Times have a strong interest in a clear directive from this Court on the questions presented by appellants concerning the constitutionality of differential and discretionary taxation of the media. Such a directive is required to eliminate conflicting decisions among the state and federal courts which have

led and will continue to lead to inconsistent rulings and interminable litigation.[1]

II.

THE QUESTIONS PRESENTED BY APPELLANTS' JURISDICTIONAL STATEMENT ARE SUBSTANTIAL AND SHOULD BE ADJUDICATED BY THIS COURT

The questions presented by appellants in this case raise important issues of constitutional law which have not previously been decided by this Court. Those issues, which involve the conflict between a state's taxing power and the right to free speech and press under the First Amendment, have ramifications that go far beyond the instant case.

The resolution of these issues is of substantial interest to all members of the media and taxing authorities throughout the country, because the City of Los Angeles is one of the largest municipalities in the United States. Its success or failure in this case will set a national pattern for what is constitutionally permissible in taxing the media.

Furthermore, many members of the media, like *amici*, have interests in the outcome of this case which transcend state lines. They are presently subjected to a variety of tax schemes based upon inconsistent interpretations of the constitutional limits on differential taxation. Without a clear directive from this Court, endless litigation in the state courts, and even greater inconsistency in the application of law by various jurisdictions, is inevitable.

In sum, all members of the media in this country, including *amici*, will be affected in some degree by this

---

[1]Pursuant to Rule 36 of the Rules of this Court, the consent of the parties for the filing of this brief has been obtained. Their letters of consent will be filed with the Clerk of this Court as soon as they are available.

Court's ruling on these issues because the principles involved are important to the operations of all media and all taxing authorities. It is therefore important for this Court to clarify in this case the constitutional limitations on differential and discretionary taxation of the media.

III.

CONCLUSION

For the reasons set forth above, *amici* respectfully request this Court to note probable jurisdiction over this case and to give plenary consideration to the important questions it presents.

December 1, 1987.

Respectfully submitted,

Of Counsel:

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Supreme Court, U.S.
FILED
DEC 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-919

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1987

THE TIMES MIRROR COMPANY,
TRIBUNE NEWSPAPERS WEST, INC.,
LOZANO ENTERPRISES,
Appellants,

VS.

THE CITY OF LOS ANGELES,
Appellee.

On Appeal from the California Court of Appeal, Second Appellate District, Division Two

LOS ANGELES HERALD EXAMINER DIVISION, THE HEARST CORPORATION, BRIEF AMICI CURIAE IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

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No. 87-919

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On Appeal from the California Court of Appeal, Second Appellate District, Division Two

LOS ANGELES HERALD EXAMINER DIVISION, THE HEARST CORPORATION, BRIEF AMICI CURIAE IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

1. Interest of Amici Curiae

The Los Angeles Herald Examiner is a general circulation newspaper that is published in Los Angeles and distributed throughout the Southern California region. It is a division of The Hearst Corporation, an organization which publishes newspapers and magazines throughout the United States.

The Los Angeles Herald Examiner is a plaintiff in a case pending in the Los Angeles Superior Court (The

Hearst Corporation v. City of Los Angeles, Case No. C 539 509) which challenges the constitutionality of the same Los Angeles Municipal Court ordinances that are the subject of the appeal being prosecuted by The Times Mirror Company and which raises issues identical to those addressed in The Times Mirror Company's jurisdictional statement. The proceedings in that action have been stayed pending the outcome of this appeal.

As a newspaper that is subject to the disputed municipal business tax, and as a division of a corporation that engages in media activity throughout the United States, the Los Angeles Herald Examiner has a vital interest in the outcome of this appeal.

Appellants and Appellee have consented to the filing of this brief. See letters attached as Exhibits A and B.

2. The Important Issues Raised by Appellants' Jurisdictional Statement Require Adjudication By This Court

This Court recognized long ago that the power to tax is the power to destroy. Appellants and Amicus Curiae are confronted with a tax imposed by the City of Los Angeles that blatantly discriminates without justification among activities protected by the First Amendment.

The Herald Examiner is distributed in an area that includes a patchwork of governmental entities in the Southern California region, including the Counties of Ventura, Los Angeles, and Orange, and dozens of cities including Los Angeles, Santa Monica, Long Beach, Beverly Hills, Anaheim and Santa Ana. The precedent established by the Los Angeles tax, if allowed to continue, presents the frightening prospect of some or all of these governmental units deciding to protect or engender some First Amendment activities while punishing others

through discriminatory tax codes. The scope of this problem is highlighted by the national interests that modern media companies have, as demonstrated by the various newspapers and magazines published by The Hearst Corporation. Absent firm direction from this Court, such media interests will be subject to a crazy quilt system of local taxation that will chill and threaten important First Amendment activities.

DATED: December 29, 1987

Respectfully submitted,

By: STEPHEN G. CONTOPULOS
Counsel of Record

Attorneys for Amici Curiae

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On December 29, 1987, I served the within Brief of Amici Curiae in support of Appellants' Jurisdictional Statement in re: "The Times Mirror Company v. The City of Los Angeles" in the United States Supreme Court, October Term 1987, No. 87-919.

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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Clerk, U.S. Supreme Court
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(orig. plus 40)

All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on December 29, 1987, at Los Angeles, California.

Ce Ce Medina

CE CE MEDINA

No. 87-919

Supreme Court, U.S.
FILED
DEC 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

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Appellee.

On Appeal from the California Court of Appeal, Second Appellate District, Division Two

REPLY MEMORANDUM

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EDITOR'S NOTE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-919

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Appellants,

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THE CITY OF LOS ANGELES,

Appellee.

On Appeal from the California Court of Appeal, Second Appellate District, Division Two

---

REPLY MEMORANDUM

Appellee's Motion provides no basis whatsoever for dismissing this appeal or for affirming the Court of Appeal's ruling below. As the following discussion will show, the arguments presented by appellee with respect to the first and third questions presented to this Court in appellants' Jurisdictional Statement are wholly without merit. In addition, the appellee's Motion does not even address the second question presented to this Court by appellants, which concerns this Court's application of *Buckley v. Valeo*, 424 U.S. 1 (1976), to a state's taxing power. Therefore, ap-

pellee implicitly has conceded that this question is substantial and therefore warrants review by this Court.

I.

APPELLANTS' FIRST QUESTION, CONCERNING DISCRIMINATORY TAX BURDENS ON THE MEDIA, IS SUBSTANTIAL AND MERITS REVIEW BY THIS COURT

The justifications for this Court's review of the appellee's tax scheme, which imposes discriminatory tax burdens on different media, are fully set forth in the Jurisdictional Statement and will not be repeated here. However, several assertions made by appellee in its Motion demand a response.

First, appellee asserts that appellants are not subjected to discriminatory taxation because they are included in a "generic" classification with other businesses engaging in wholesale or retail sales. Motion, at 3-5. This assertion completely misses the point of appellants' argument. What appellee carefully ignores is its differential tax treatment of different media. Under the challenged tax scheme, newspapers are treated differently, for example, from billboard companies and motion picture producers in the absence of any justification, compelling or otherwise, for such differentiation.

Such differential taxation must be subjected to the same exacting constitutional scrutiny as was the differential taxation present in *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983). The harms that this Court sought to avoid in *Minneapolis Star*—namely, the government's abil-

ity to use its taxing power to censor the press by differential taxation—are just as threatening under the facts of the instant case. Under appellee's submission, there would be no constitutional barrier to appellee's shifting members of the media to less favorable categories of taxation depending upon the content of their speech.

Furthermore, it is just as destructive of constitutional values to permit the government to tax favorably one group of media (namely, movie producers), at the expense of others, as it is to penalize one or a few members of the media by unfavorable taxation. *Minneapolis Star*, 460 U.S., at 589-90 ("the very selection of the press for special treatment threatens the press not only with the current differential treatment, but with the possibility of subsequent differentially more burdensome treatment"). Thus, the instant case presents the "flip side" of *Minneapolis Star*: there, the government singled out a few members of the media for harsh treatment; here, the government has singled out a few members of the media for overwhelmingly favorable treatment. As this Court has recognized, neither scheme is constitutionally permissible. *Id.*

Second, with regard to the differential taxation of movie producers, appellee responds by asserting that the movie industry is "fragmented," and that "all the fragments" are taxed. Motion, at 9. This argument is also unresponsive.

Appellee has never attempted, either before the courts below or before this Court, to offer even the slightest justification for the vastly disparate treatment given to movie producers under the challenged tax scheme. In addition, no justification has been

shown for the particular tax structure here that "caps" taxes paid by movie producers at $10,750, while the taxes paid by newspapers and all other media are unlimited. Similarly, no justification has been offered for the disparate treatment of other members of the media, such as billboard companies. Under this Court's holding in *Minneapolis Star*, it is appellee's burden to demonstrate a compelling justification for this differential taxation of the media. 460 U.S., at 585. Appellee has not even attempted to meet this burden.

Third, appellee characterizes appellants' argument as requiring that it impose a uniform tax on all businesses. This characterization is simply unfounded. It is true that where the media are involved, there is a presumption that all members of the media must be treated alike *unless* there is a showing that a compelling governmental interest justifies differential treatment. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). It is appellee's failure to offer any such justification that is the vice in the challenged tax scheme.

Finally, appellee attempts to argue that there are no inconsistent decisions among the state and federal courts on the questions presented by appellants. Motion, at 11-13. However, even a cursory reading of the cases cited in the Jurisdictional Statement, and the legal analysis each sets forth, establishes that a conflict of authority exists, not only among different states, but even among the Courts of Appeal of California and between the federal and state courts. For this reason alone there is a clear and immediate need for this Court to note probable jurisdiction over this case and to give plenary consideration to these issues.

II.

APPELLANTS' THIRD QUESTION, CONCERNING THE GRANTING OF STANDARDLESS DISCRETION TO A GOVERNMENT OFFICIAL TO APPORTION TAXES ON THE MEDIA, IS SUBSTANTIAL AND MERITS REVIEW BY THIS COURT

The third question presented to this Court, concerning the constitutionality of granting standardless discretion to a government official to apportion taxes on the media, is discussed at length in the Jurisdictional Statement and will not be repeated here. Once again, however, several unsupportable assertions made by appellee warrant a reply.

First, appellee claims that the exercise of standardless discretion is totally immune from constitutional scrutiny in the taxation context, purportedly because its taxation scheme is not "regulatory." Motion, at 13-14. This breathtaking assertion is meritless. No such constitutional distinction exists between the States' exercise of the regulatory and taxing powers, as was explained in the Jurisdictional Statement, at 15-16. Moreover, the challenged ordinance provides that all persons engaged in business must obtain a "business tax registration certificate," the issuance and retention of which is *expressly conditioned* upon paying the taxes assessed under the City business tax. L.A.M.C. §§ 21.03(a), 21.08. Thus, the discrimination practiced in appellee's tax scheme directly affects appellants' ability to obtain a business license.

Furthermore, the fact that appellee's Clerk has promulgated regulations that might, in some cases, apportion taxes in a constitutional manner is irrelevant to a consideration of the facial validity of the business

tax. By its own terms, the challenged Municipal Code permits the Clerk to modify the regulations at his whim, thereby affording the Clerk precisely the sort of standardless discretion which this Court has repeatedly struck down. J.S., App. E, 33a (permitting Clerk to promulgate whatever regulations "are necessary and desirable").

Finally, appellee's attempt to distinguish *Big Mama Rag v. United States*, 631 F.2d 1030 (D.C. Cir. 1980), is without merit. Notwithstanding appellee's assertions to the contrary, Motion, at 14-15, the regulations which were struck down in *Big Mama Rag* did not involve content-based discrimination. Rather, the regulations involved were so vague that they would have *permitted* the IRS to discriminate against certain individuals based upon their exercise of First Amendment rights. *Id.*, at 1040. It was the vagueness of those regulations that rendered them unconstitutional, not whether the regulations had actually been implemented by the IRS in a discriminatory fashion. Similarly, appellee's apportionment scheme is unconstitutional because of its vagueness.[1]

III.

CONCLUSION

Appellee has utterly failed to provide any justification for dismissal of appellants' appeal or for summary affirmance of the Court of Appeal's decision. Therefore, probable jurisdiction should be noted and

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[1] The City's reliance on *Regan v. Taxation with Representation*, 461 U.S. 540 (1983), is also unpersuasive given this Court's understanding of *Regan* set forth in *Arkansas Writers' Project v. Ragland*, No. 85-1370 (Apr. 22, 1987), 107 S. Ct. 1722 (1987).